Supreme Court, U.S.
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In The

Supreme Court of the United States

MICHAEL X. ST. MARTIN, VIRGINIA RAYNE ST. MARTIN, QUALITY ENVIRONMENTAL PROCESSES, INC., SAMUEL J. STAGG, III, M.D., JULIE M. STAGG, JAMES G. FISTER, LINDA F. FISTER, AND BAYOU AREA CHILDREN'S FOUNDATION, INC.,

Petitioners,

v.

ENERGY DEVELOPMENT CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN MAMOULIDES
3421 N. Causeway Blvd.,
Suite 601
Metairie, LA 70002

A. J. GRAY, III*
THE GRAY LAW FIRM
P.O. Box 1467
Lake Charles, LA 70602
Tel: (337) 494-0694

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

In this multi-million dollar mineral rights case, the United States Court of Appeals for the Fifth Circuit affirmed a declaratory judgment of the United States District Court that is directly contrary to a prior state court decision in favor of Petitioners, in a case between the same parties involving the same property and the same dispositive issues, including the validity and effect under Louisiana law of the exact same deed and mineral conveyance. The decision also directly conflicts with yet a second state court suit between the same parties involving the same property and the same dispositive issues, in which the Louisiana court recently held that the first final state court judgment in favor of Petitioners was *res judicata*. The result is that Petitioners now have two Louisiana state court judgments in their favor involving the same property and instruments that irreconcilably conflict with the federal judgment, which will permanently cloud title to their property.

The Fifth Circuit's decision presents the following important questions:

1. Whether the federal courts had jurisdiction to render and affirm a judgment directly contrary to a prior state court judgment involving the same parties, property, instruments and "inextricably intertwined" issues, considering this Court's decisions in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983) and progeny?

QUESTIONS PRESENTED – Continued

2. Whether, in rendering a declaratory judgment directly contrary to the prior decision of the state court involving the same parties, property, instruments and issues of Louisiana property law, and in refusing to abstain or stay this case pending resolution of that case and a second state court case involving the same parties, property, instruments and identical issues of Louisiana law of *res judicata*, the federal courts violated principles of comity, federalism, and avoidance of duplicative litigation and inconsistent results expressed in numerous decisions of this Court, particularly *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) and *Brillhart v. Excess Ins. Co.,* 316 U.S. 491, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942)?

3. Whether, in refusing to afford the prior final and definitive judgment of the Louisiana state court the same preclusive effect it would have under Louisiana law, the Fifth Circuit violated the Full Faith and Credit Act, 28 U.S.C. § 1738, and cases from this Court, including, *inter alia, Marrese v. American Academy of Orthopedic Surgeons,* 470 U.S. 373, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985) and *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and progeny? Specifically:

a. Considering that in Louisiana, a judgment is not final for purposes of *res judicata* until the Louisiana Supreme Court has denied writs, did the Fifth Circuit err in determining that Petitioners, who repeatedly notified the district court of the judgment,

QUESTIONS PRESENTED – Continued

should have filed a formal Motion in the district court before the state court judgment was final?

b. Considering that in Louisiana, *res judicata* is mandatory and may be asserted on appeal, did the Fifth Circuit err in holding that Petitioners' assertion of *res judicata* on appeal was untimely?

c. Considering that in Louisiana, the courts of appeal remand for determination of factual issues relating to *res judicata*, did the Fifth Circuit err in determining that an alleged factual dispute precluded application of *res judicata*?

d. Considering that Louisiana law on claim preclusion and claim-splitting bars litigation of claims arising out of the same "transaction or occurrence" that could have been raised in a prior suit, and that Louisiana courts hold that cases involving the effects of the same instruments arise out of the same "transaction or occurrence," did the Fifth Circuit err in failing to hold that claim preclusion applied?

e. Considering Louisiana law on issue preclusion, as well as the second state court's grant of Petitioners' identical Motion based on issue preclusion, did the Fifth Circuit err in holding that dispositive issues determined by the first state court were not necessary to the judgment?

4. Alternatively, assuming (but not conceding) that the Fifth Circuit properly applied federal

QUESTIONS PRESENTED – Continued

rather than state law of *res judicata*, whether the Fifth Circuit erred in failing to find that Petitioners' repeated reference to the non-final judgment in its Answer, Motions and Pre-Trial Order was sufficient, and that a factual dispute on an alternative argument that was not ruled upon, and thereby rejected by the federal district court, barred consideration of *res judicata* as grounds to reverse a decision on appeal?

5. Whether the federal courts' failure to apply substantive Louisiana property law reflected in decisions by the state Supreme Court as well as the final and definitive decision of the state court between the same parties on the exact issues of Louisiana law, which will promote forum shopping and inequitable administration of state laws, violated *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and progeny?

6. Whether the Fifth Circuit erred in failing to review the federal district court's erroneous determinations of state property law and reverse on the merits, considering its duties as a reviewing Court and this Court's decision in *Salve Regina College v. Russell,* 499 U.S. 225, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991)?

RULE 14.1(b) AND RULE 29.6 STATEMENT

Parties in this Court include:

1. Michael X. St. Martin
2. Virginia Rayne St. Martin
3. Quality Environmental Processes, Inc. (There is no parent company or publicly held company owning 10% or more of this Petitioner's stock.)
4. Samuel J. Stagg, III, M.D.
5. Julie M. Stagg
6. James G. Fister
7. Linda F. Fister
8. Bayou Area Children's Foundation, Inc. (There is no parent company or publicly held company owning 10% or more of this Petitioner's stock.)
9. The Louisiana Land And Exploration Company, Inc.
10. Energy Development Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Michael X. St. Martin, Virginia Rayne St. Martin, Quality Environmental Processes, Inc., Samuel J. Stagg, III, M.D., Julie M. Stagg, James G. Fister, Linda F. Fister, and Bayou Area Children's Foundation, Inc., respectfully request that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit denying Rehearing and Rehearing en banc (App. 68) is unreported. The decision of the Fifth Circuit (App. 1) is reported at 296 F.3d 356. The decision of the United States District Court (App. 19) is reported at 128 F. Supp. 2d 368.

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit was issued on February 20, 2002 and amended on June 27, 2002. The decision of the Fifth Circuit denying Rehearing and Rehearing en banc was rendered on December 3, 2002. The jurisdiction of this Court is proper under 28 U.S.C. § 1254 and Rule 13.3 of the Rules of this Honorable Court.

STATUTORY PROVISIONS

28 U.S.C. § 1738, The Full Faith and Credit Act
LSA-R.S. 13:4231, *Res Judicata*
La. Code Civ. Proc. art. 425, Preclusion by Judgment
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La. Code Civ. Proc. art. 2167, Finality of Judgments
LSA-R.S. 9:2721, Public Records Doctrine

LSA-R.S. 31:76, Mineral Servitudes
La. Civ. Code art. 730, Predial Servitudes
Fed. R. Civ. Proc. 12(h)(3), Defenses and Objections

(See App. 71-79 for text)

STATEMENT OF THE CASE

These consolidated diversity suits involve the disputed ownership of mineral rights on property in the Lake Hatch-Sunrise Field in Terrebonne Parish, Louisiana owned by Petitioners. There are also several state court suits involving the same issues and the same property. The multiplicity of lawsuits is primarily due to the fact that Respondent, Energy Development Corporation ("EDC") filed three separate suits in both state and federal court against Petitioners, the St. Martins and Quality Environmental Processes, Inc. ("Quality"), seeking a declaratory judgment that it owned mineral rights on the same large, contiguous area of the St. Martin's property by virtue of the same 1971 Mineral Conveyance.

EDC filed the captioned consolidated suits, docket numbers 98-3395 and 99-1793,[1] in the United States District Court, Eastern District of Louisiana against Petitioners, the St. Martins and Quality.[2] In both suits, EDC sought a declaratory judgment that it was the owner of a mineral servitude on a large, contiguous area of the

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[1] Jurisdiction in the district court was based upon diversity of citizenship, 28 U.S.C. § 1332.

[2] In No. 98-3395, EDC also included Louisiana Land and Exploration Company ("LL&E") as a defendant, due to the fact that it had mineral leases with both the St. Martins and EDC on the same property. LL&E maintained that it was a disinterested stakeholder, and filed an interpleader. In No. 99-1793, EDC filed suit against the St. Martins and Quality as well as other surface owners, the Staggs, the Fisters, and Bayou Area Children's Foundation, Inc., all of whom had the same predecessors in title and are Petitioners herein.

St. Martin's property by virtue of a 1971 Mineral Conveyance.

Prior to filing the captioned consolidated suits, on July 7, 1997, EDC filed a virtually identical suit against the St. Martins and Quality in the 24th Judicial District in Jefferson Parish, Louisiana ("Jefferson Parish case"). Therein, EDC also sought a declaratory judgment that it was the owner of mineral rights on the same large, contiguous area of the St. Martin's property, relying on the same 1971 Mineral Conveyance.

Further, on September 14, 1998, EDC, the St. Martins and Quality were named as defendants in a state court concursus proceeding filed by Mandalay Oil & Gas L.L.C. and Voyager Petroleum, Inc., in the 32nd Judicial District Court for the Parish of Terrebonne, Louisiana ("Terrebonne Parish case") involving the same property, instruments and issues.[3]

To explain its multiple filings, EDC claimed that the state and federal proceedings involved different tracts of property in the Lake Hatch-Sunrise Field. EDC urges that the Jefferson Parish case concerned only the area known as the "protective area,"[4] and that the federal suits involved different tracts outside of that area.[5] However,

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[3] EDC unsuccessfully attempted to remove that case to federal court. See, *Mandalay Oil & Gas, L.L.C. v. Energy Development Corp.*, 1998 WL 850531 (E.D. La. Dec 08, 1998) (remanding to state court).

[4] This contention, raised by EDC after the Jefferson Parish decision became final, is directly contrary to EDC's Petition in the Jefferson Parish case affirmatively seeking a declaratory judgment that it was the owner of all mineral rights purportedly conveyed by the 1971 Mineral Conveyance, including substantial property outside the protective area, and the express rejection of that claim by both the state district court (App. 95) and state court of appeal. App. 80.

[5] To the contrary, as the federal district court noted, the federal cases also involved determination of the ownership of EDC's mineral rights within the protective area, which was a critical issue:

(Continued on following page)

central to EDC's pleading and proof in all suits was the claim that it held a valid mineral servitude on a large, contiguous area of land, including the protective area and all of the other tracts at issue in the state and federal cases, by virtue of the same 1971 Mineral Conveyance. In both the state and federal cases, the St. Martins and Quality disputed EDC's ownership of mineral rights, citing conveyances executed in their favor, and the ten year prescription of non-use, and further urged that the 1971 Mineral Conveyance recited only an ambiguous, omnibus description of the property, and did not affect them as third parties.

EDC filed the state court action first, and could easily have amended its Petition rather than filing the separate federal suits; however, it chose not to do so. As such, the exact issues as to the validity and effect of the 1971 Mineral Conveyance and a 1966 deed, the existence of the alleged large contiguous servitude under the 1971 Mineral Conveyance, as well as the ownership of the mineral rights in the "protective area" and other lands allegedly conveyed

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Although the ultimate issue before the Court is the mineral ownership of those four tracts, counsel for EDC correctly notes those tracts figure only marginally in the two principal debates between it and the surface owners in these consolidated proceedings.

The immediate issues focus rather on the mineral ownership of a tract of land lying to the south of those four tracts referred to throughout this opinion and the testimony of expert witnesses as the red-outlined "protective area."

Federal District Court Opinion at 371-372 (Emphasis added); App. 24.

The ownership of mineral rights in the protective area was critical to EDC's federal case: "with the red-outlined 'protective area' completely carved out of the May 3, 1971 servitude, it does not create one large contiguous servitude but rather affects noncontiguous tracts, and thus, operations on any one tract would not interrupt prescription as to any other noncontiguous tract." *Id.* at 372; App. 28.

by the 1971 Mineral Conveyance, were to be tried and determined by both the federal and state courts.

The federal district court was well aware of the concurrent Jefferson and Terrebonne Parish state court proceedings. Petitioners repeatedly raised the issue in their pleadings and motions, including their Answer (I R. 41, 44), a motion specifically requesting a continuance without date pending resolution of the state court proceedings (I R. 3, 8, 14-15) which the court denied, and two motions asking the court to abstain based on the Terrebonne Parish proceedings, which the court also denied. I R. 239, 242, 252-260, App. 61.

On December 17, 1999, the state court in the Jefferson Parish case issued a judgment against EDC and in favor of the St. Martins and Quality on all issues. The trial judge specifically held that the property description in the 1971 Mineral Conveyance was not adequate to put third parties on notice and therefore was invalid under Louisiana law. Any mineral rights EDC may have had in the protective area were created by an instrument dated August 31, 1966, and were extinguished by prescription of non-use for ten years. The trial judge specifically stated in his written reasons that the large area over which EDC claimed a servitude was not contiguous. App. 127-28. Therefore, prescription was not interrupted. EDC filed a **suspensive** appeal of the Jefferson Parish Judgment, which, under Louisiana law, suspended all legal effects of the judgment, including any effects as *res judicata*.

Even though it was not yet a final judgment, Petitioners listed the foregoing 1999 Jefferson Parish judgment in the Pre-Trial Order in the instant federal suits as a "special issue or defense." II R. 945. EDC, in the Pre-Trial Order, noted that this judgment, which was on appeal, was invalid as contradictory to the state court of appeal's prior

decision reversing the state court's grant of a Motion for Summary judgment. 2 R. 945.[6]

On December 4, 2000, **after** the trial of the federal suits, the state court of appeal affirmed the Jefferson Parish Judgment in favor of the St. Martins and Quality and against EDC on all issues. *See, Energy Development Corporation v. Quality Environmental Processes, Inc., et al.*, 00-314 (La. App. 5th Cir. 12/04/00), 777 So.2d 481, App. 80.

Therein, the Louisiana court of appeal ruled that EDC was not entitled to a mineral servitude over either the property in the "protective area" or the considerable additional real estate contiguous to the protective area (including the specific parcels at issue in the instant federal cases) that EDC claimed by virtue of the 1971 Mineral Conveyance. As to the property within the protective area, the Court found that it had been previously conveyed by the 1966 conveyance, and was therefore excepted from conveyance under the terms of the 1971 Mineral Conveyance, and that EDC's rights had prescribed for non-use. Nor was EDC entitled to the large, contiguous servitude it claimed under the 1971 Mineral Conveyance, because EDC never established the boundaries of such a servitude, and because under Louisiana law the 1971 Mineral Conveyance was invalid as to third parties such as the St. Martins for lack of notice and an adequate property description. EDC filed an Application for Writs in the Louisiana Supreme Court, which again,

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[6] Complicating matters, on October 16, 2000, the trial judge in the Terrebonne Parish concursus case ruled that the property description in the 1971 Mineral Conveyance was sufficient to put third parties on notice, and that EDC had established the existence of a single, large, contiguous servitude. As discussed *infra*, that decision, which was not final, was subsequently reversed based on Petitioners' exception of *res judicata* filed in the Louisiana court of appeal after the Jefferson Parish Judgment became final and definitive.

under Louisiana law, suspended the effects and the finality of the judgment.

On December 6, 2000, counsel for Petitioners sent the federal district court a copy of the December 4, 2000 opinion of the Louisiana court of appeal. Nevertheless, six days later, on December 12, 2000, the district court rendered a Memorandum Opinion in the captioned consolidated cases in favor of EDC. *See, Energy Development Corp. v. St. Martin,* 128 F. Supp. 2d 368 (E.D. La. 2000), App. 19.

The federal district court held, directly contrary to the Jefferson Parish state court, that EDC acquired a servitude over the large contiguous area of land via the same 1971 Mineral Conveyance, which, it held, provided a legally acceptable description to put third parties on notice. The court further held that the 1966 conveyance did not except the protective area from transfer under the 1971 Mineral Conveyance, and that EDC owned mineral rights in the protective area. These decisions were directly contrary to the state court's decisions on the exact issues, as well as settled Louisiana law regarding servitudes and property. Petitioners timely filed a Notice of Appeal with the Fifth Circuit.

On March 9, 2001, during the pendency of this appeal, the Louisiana Supreme Court denied EDC's Application for Writs in the Jefferson Parish case, therefore the judgment became final and definitive under Louisiana law. Accordingly, the St. Martins and Quality filed Motions to Dismiss in the pending Terrebonne Parish appeal and in this appeal raising the issue of *res judicata*.[7]

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[7] Thereafter, EDC, for the first time, began to argue that the Jefferson Parish Judgment was a nullity for failure to particularly describe the parties and property. Moreover, despite its own pleadings affirmatively seeking a declaratory judgment that it was the owner of mineral rights on **all** lands allegedly conveyed by the 1971 Mineral Conveyance, and the court's express rejection of this claim, EDC began

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On July 13, 2001, Petitioners filed in the Fifth Circuit a Motion to Dismiss based on *res judicata,* including both claim and issue preclusion. Petitioners further addressed those issues in their Original Brief served on August 7, 2001, and in oral argument before the Court. In addition, Petitioners argued that the district court's decision was erroneous and directly contrary to Louisiana law on servitudes and property, and should be reversed on the merits.

On February 20, 2002, the Fifth Circuit issued a two sentence *per curiam* decision affirming the judgment of the district court, stating in part: "The *res judicata* defense asserted by appellant for the first time on appeal was not timely raised in the district court and therefore is waived." App. 17. From this decision, Petitioners timely filed a Petition for Rehearing and Rehearing en banc. Thereafter, the Fifth Circuit amended its Opinion, but specifically noted that its amended Opinion did not resolve the pending Petition for Rehearing en banc. App. 2.

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to claim that the only property affected by the judgment was within the "protective area."

The St. Martins and Quality therefore filed, in the Jefferson Parish District Court, a Rule to Provide a More Complete Property Description, which the Court granted. The Court clarified, for EDC's benefit, that none of the St. Martins' property was "burdened by any mineral servitude purported to have been established by the May 3, 1971 ... general mineral conveyance," which the Court in its judgment had expressly stated was invalid as to "third parties," *e.g.*, the St. Martins and Quality. EDC appealed that judgment.

The Court of Appeal, with two judges dissenting, held that certain portions of the Amended Judgment were substantive, and therefore impermissible under Louisiana law. *Energy Development Corporation v. Quality Environmental Processes, Inc., et al.,* 02-221 (La. App. 5 Cir. 11/26/02) 834 So.2d 513. This ruling, however, does not and cannot affect the prior final and definitive decision of the Jefferson Parish Court, which was the basis of Petitioners' claims of *res judicata* in this case and the Terrebonne Parish case.

In its amended Opinion dated June 27, 2002, the Fifth Circuit, applying federal law, decided that *res judicata* could only be raised on appeal to reverse a decision when the facts necessary for application of the defense are found in the record and are uncontroverted, which, it determined, was not the case herein.

The Panel, focusing on issue preclusion, without application of the Louisiana "transaction or occurrence" test for claim preclusion, also found that the Jefferson Parish Court's conclusions as to the validity and effect of the 1971 Mineral Conveyance were not essential to the judgment. The Court based its conclusion on its factual finding, contrary to the Jefferson Parish decision, that the only property at issue in the Jefferson Parish case was within the "protective area."[8]

The Fifth Circuit found that the only possible preclusive portion of the Jefferson Parish Judgment was its conclusion that the 1966 deed conveyed mineral rights in the protective area, thereby excepting this area from conveyance under the terms of the 1971 Mineral Conveyance, and that EDC's rights had prescribed. Under the express terms of the federal district court's opinion, applying this holding should have resulted in a decision for Petitioners, because carving out the lands in the protective area meant that the servitude was not contiguous and that drilling on one tract would not interrupt prescription as to the tracts at issue.

However, the Fifth Circuit decided that a "factual dispute" precluded application of *res judicata*, based on an alternative argument raised by EDC that a small 41'

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[8] Even were this true, the Jefferson Parish Court still had to determine the validity and effect of the 1971 Mineral Conveyance and the alleged contiguity of the property, to determine EDC's rights in the protective area.

corridor maintained contiguity of the property conveyed by the 1971 Mineral Conveyance, upon which argument the federal district court did not rule, and therefore implicitly rejected.[9] Rather than remanding for resolution of the "factual dispute," the Panel affirmed the conflicting decision of the district court in favor of EDC involving the exact same agreements, the same property and the same parties in the state court cases.

On July 3, 2002, less than a week after the Fifth Circuit issued its amended opinion, the Louisiana First Circuit Court of Appeal in the Terrebonne Parish case **reversed** the decision of the trial court in favor of EDC based on Petitioners' exception of *res judicata* raised on appeal. See, note 6, *supra*; *Mandalay Oil and Gas, L.L.C. and Voyager Petroleum, Inc., v. Energy Development Corp.*, 2001-0993 (La. App. 1 Cir. 7/3/02), 2002 WL 1434422, App. 130.

The Louisiana Court of Appeal noted that in Louisiana, application of *res judicata* is mandatory, and that under Louisiana law of Lis Pendens, in multiple suits between two parties involving the same transaction or occurrence, the first final judgment rendered "shall be" conclusive of all. *Id.* at 6. The Court also correctly held that in Louisiana, an exception of *res judicata* may be raised for the first time on appeal. Because the Court found that the evidence in the record was unclear, the Court remanded the case to the trial court for a determination on the preclusive effect of the Jefferson Parish Judgment, including the scope of the servitudes and property affected by the decision, important issues that the Court of Appeal in this case resolved against Petitioners.

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[9] The Jefferson Parish court expressly rejected this argument. App. 127-128.

Petitioners notified the Fifth Circuit of the foregoing developments in a letter supplement to their Petition for Rehearing, and again requested that the Court wait until the state courts had resolved the issues. Nevertheless, on December 3, 2002, prior to the Terrebonne Parish trial court's ruling on *res judicata*, the Court denied the Petition for Rehearing and Petition for Rehearing en banc. App. 68.

Subsequently, in Reasons for Judgment rendered on January 27, 2003 (App. 142), the Terrebonne Parish court ruled that the judgment of the Jefferson Parish court, which became "final and valid" when writs were denied by the Louisiana Supreme Court, was conclusive of the issues in the Terrebonne Parish case, which, like the instant cases, involved property outside of the "protective area." Specifically, the Court found that its prior judgment was based on its determination that the 1971 Mineral Conveyance *did* create mineral rights that favored EDC, and that the property description *was* adequate to affect third parties (which were the exact findings of the district court in the instant case). In contrast:

> The Jefferson Parish Judgment was based on its determination that the 1971 Mineral Conveyance *did not* create mineral rights or servitudes that ultimately favored EDC and that the property description in the 1971 Mineral Conveyance *was not* adequate to affect third parties. These issues actually were litigated in the Jefferson Parish proceeding and both were resolved against EDC. The resolution of both of these issues was essential to the Jefferson Parish decision; a contrary ruling with regard to both issues necessarily would have resulted in a judgment in favor of EDC. *Id.* (Emphasis in original); App. 147.

The Court concluded: "Because the Jefferson Parish judgment is a valid and final judgment which resulted from the resolution of issues identical to those presented in the Terrebonne Parish case and essential to the Jefferson Parish judgment, and because both cases were litigated by

the same opposing parties in both venues, collateral estoppel rules require that this court accept the Jefferson Parish resolution of said issues." App. 148. As such, a Louisiana Court addressing the same issues, and applying Louisiana law of *res judicata* has reached a result opposite to the decision of the Fifth Circuit.

The result of the Fifth Circuit's decision is that the parties now have irreconcilably conflicting state and federal judgments in their favor on the exact issues, instruments and property. Neither side is likely to concede the supremacy of one judgment over the other. Unless and until this issue is settled, hundreds of acres of property will effectively be placed out of commerce, and title to Petitioners' property will be irreparably clouded.

REASONS FOR GRANTING THE WRIT

The judgment in this case directly conflicts with decisions of this Court, decisions of the Louisiana Supreme Court, and federal and Louisiana law. In addition, this case presents issues of exceptional importance involving comity, federalism and respect for the judgments of state courts.

First, the decision directly conflicts with decisions of this Court holding that federal courts do not have jurisdiction to collaterally reverse, modify or alter a judgment of a state court or to rule upon issues that are "inextricably intertwined" with the state court case, including, *inter alia, Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923) and *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), meriting a writ. The parties or the Court may raise the issue of lack of jurisdiction at any time.

Second, in rendering and affirming a declaratory judgment directly contrary to a prior final decision of a state court regarding the validity of the identical instruments under Louisiana property law, and in refusing to abstain or stay the proceedings pending resolution of that

case and a second state court case on identical issues on Louisiana law of *res judicata*, the courts violated decisions of this Court regarding comity, federalism, abstention, stays, and avoidance of duplicate litigation and inconsistent results, including, *inter alia, Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) and *Brillhart v. Excess Ins. Co.,* 316 U.S. 491, 495, 62 S.Ct. 1173, 1175, 86 L.Ed. 1620, 1625 (1942), meriting a writ.

Third, in refusing to afford the prior final and definitive judgment of a Louisiana state court the same preclusive effect it would have under Louisiana law, the decision violates the Full Faith and Credit Act, 28 U.S.C. 1738, and conflicts with cases from this Court, including, *inter alia, Marrese v. American Academy of Orthopedic Surgeons,* 470 U.S. 373, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985) and *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and progeny, meriting a writ.

Fourth, and alternatively, assuming (but not conceding) that the Fifth Circuit properly applied federal rather than state law, the Fifth Circuit erred in determining that Petitioners' repeated notification to the trial judge of the non-final judgment in its Answer, pleadings and motions was insufficient, and that a factual dispute on an alternative argument that was not ruled upon, and was thereby rejected by the federal district court, barred consideration of *res judicata* as grounds to reverse a decision on appeal.

Fifth, in failing to apply substantive Louisiana law involving servitudes and property (including the state court's decisions on the exact issues of law), the decision is contrary to this Court's decisions in *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and progeny, requiring federal courts to apply the law of the state in which they sit, and will promote forum shopping and inequitable administration of Louisiana law in mineral servitude and property cases, meriting a writ.

Finally, Petitioners respectfully submit that the Fifth Circuit's failure to conduct any review of the district

court's erroneous determinations of Louisiana law and reverse on the merits was contrary to its duties as a reviewing Court and this Court's decision in *Salve Regina College v. Russell,* 499 U.S. 225, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991), requiring that federal courts of appeals review a district court's findings of state law, meriting a writ.

Accordingly, Petitioners respectfully request that this Court grant the writ, and, after due proceedings, dismiss the captioned suits against the St. Martins and Quality Environmental Processes Inc. on grounds of *res judicata*, reverse the district court's legally erroneous decision as to all Petitioners,[10] and grant all other appropriate relief.

I. THE DECISION CONFLICTS WITH DECISIONS OF THIS COURT HOLDING THAT FEDERAL COURTS DO NOT HAVE JURISDICTION TO COLLATERALLY REVERSE OR ALTER STATE COURT JUDGMENTS, MERITING A WRIT.

In *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923) and *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), this Court definitively established that "federal district courts, as courts of original jurisdiction, lack appellate jurisdiction to review, modify, or nullify final orders of state courts." *Liedtke v. State Bar of Texas,* 18 F.3d 315, 317 (5th Cir. 1994), *cert. denied,* 513 U.S. 906, 115 S.Ct. 271, 130 L.Ed.2d 189 (1994).[11]

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[10] Only the St. Martins and Quality may claim the benefits of *res judicata*; however, reversal on the merits under the correct application of Louisiana law of servitudes and property, as requested herein, will result in a judgment in favor of all Petitioners.

[11] Numerous decisions of the Louisiana Supreme Court also hold that once a Louisiana judgment has become final and definitive, "no

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The *Rooker-Feldman* doctrine prohibits a federal court from considering claims actually decided by a state court, *Rooker, supra,* 263 U.S. at 415-16. Moreover, if the federal court is confronted with issues that are "inextricably intertwined" with a prior state court judgment, the court is "in essence being called upon to review the state-court decision," *U.S. v. Shepherd,* 23 F.3d 923 (5th Cir. 1994), citing *Feldman,* 460 U.S. at 482 n. 16, 103 S.Ct. at 1315 n. 16, and the originality of the district court's jurisdiction precludes such a review. *Id.*

In this case, the prior state court judgment, which had been affirmed on appeal at the time the federal district court ruled,[12] and was final and definitive at the time the Fifth Circuit ruled, involved the exact issues in this case, particularly the effect of the 1966 deed and the validity of the 1971 Mineral Conveyance. Those issues were identical to and/or inextricably intertwined with the state court judgment; therefore, the federal courts had no jurisdiction to render a contrary decision on these issues.

The issue of lack of subject matter jurisdiction may be raised at any time by the parties or *sua sponte* by the Court, pursuant to Fed. R. Civ. Proc. 12(h)(3). Petitioners raised this issue before the Fifth Circuit, which declined to address it.

The federal courts' failure to dismiss this suit for lack of jurisdiction is directly contrary to the foregoing authorities, meriting a writ.

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court has jurisdiction to change the judgment." *Avenue Plaza, L.L.C. v. Falgoust,* 96-0173 (La. 7/2/96), 676 So.2d 1077; *Tolis v. Board of Sup'rs of Louisiana State University,* 95-1529 (La. 10/16/95), 660 So.2d 1206.

[12] At least four Circuits have held that the *Rooker-Feldman* doctrine applies to judgments of intermediate state courts that are not yet final and definitive. See, *Kenmen Engineering v. City of Union,* 314 F.3d 468, 473-5 (10th Cir. 2002) (collecting federal cases).

II. THE DECISION CONFLICTS WITH DECISIONS OF THIS COURT REGARDING COMITY, FEDERALISM, ABSTENTION, STAYS AND AVOIDANCE OF DUPLICATIVE LITIGATION AND INCONSISTENT RESULTS, MERITING A WRIT.

Both the district court and the Fifth Circuit were apprised of the progress of the state court suits concerning Petitioners' property at all times. Again, Petitioners cited both suits in their Answer, filed two motions requesting that the district court abstain, which were denied, filed a Motion to continue without date until the state court proceedings were concluded, which was denied, and also requested on appeal that the Fifth Circuit wait until the court in the Terrebonne Parish case ruled on Petitioners' exception of *res judicata*, which it declined to do.

Petitioners submit that both the district court and the Fifth Circuit, in rendering and affirming a declaratory judgment directly contrary to the state court decisions, and in refusing to abstain or at least withhold ruling until resolution of the state court suits, violated principles of comity, federalism and respect for state tribunals set forth in numerous decisions of this Court, including, *inter alia*, *Railroad Com. of Texas v. Pullman Co.*, 312 U.S. 496, 85 L.Ed. 971, 61 S.Ct. 643 (1941); *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) and progeny; *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943); and particularly *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976).[13]

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[13] In *Colorado River*, which involved a declaration of water rights, this Court relied heavily on cases holding that the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts, *id.* at 818, 1246, citing, *inter alia*, *Princess Lida v. Thompson*, 305 U.S. 456, 466, 59 S.Ct. 275, 280, 83 L.Ed. 285, 291 (1939), despite the fact that the court did not need to obtain in rem or

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Furthermore, the decision directly conflicts with *Brillhart v. Excess Ins. Co.,* 316 U.S. 491, 495, 62 S.Ct. 1173, 1175, 86 L.Ed. 1620, 1625 (1942) ("uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties") and *Wilton v. Seven Falls Co.,* 515 U.S. 277, 282, 115 S.Ct. 2137, 2140, 132 L.Ed.2d 214 (1995),[14] meriting a writ.

III. THE DECISION VIOLATES THE FULL FAITH AND CREDIT ACT, 28 U.S.C. § 1738, AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT, MERITING A WRIT.

The Full Faith and Credit Act, 28 U.S.C. § 1738, provides that the Acts, records and judicial proceedings of a state "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." *Id.* The Full Faith and Credit Act further requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given under the law of the state in which judgment was rendered. *Marrese v. American Academy of Orthopedic Surgeons,* 470 U.S.

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quasi in rem jurisdiction. Accord, *Wolf v. District Court In and For Northern Dist of California,* 235 F. 69 (9th Cir. 1916). The same result should apply in this case, which involves a declaration of mineral rights on property subject to the prior jurisdiction of the state courts.

[14] See also, *Louisiana Power & Light Co. v. City of Thibodaux,* 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959) (affirming stay of proceedings pending state court declaratory judgment action); *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593, 20 L.Ed. 835, 88 S.Ct. 1753 (1968) (reversing court's refusal to stay diversity action until determination of pending state court declaratory judgment suit involving same issues of state law).

373, 105 S.Ct. 1327, 1331-32, 84 L.Ed.2d 274 (1985); *Migra v. Warren City School District Board of Education,* 465 U.S. 75, 81, 104 S.Ct. 892, 896, 79 L.Ed.2d 56 (1984). This deference is also required under *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and progeny.

In the instant case, the federal courts clearly violated the foregoing principles. First, the district court, which had full knowledge of the Jefferson Parish court of appeal decision on the identical issues, including the effect of the 1966 deed and the validity of the 1971 Mineral Conveyance, simply ignored it and rendered a completely contrary decision. Moreover, as discussed in detail *infra*, the Fifth Circuit, in determining the issue of *res judicata*, failed to accord the Jefferson Parish decision the same preclusive effect that it was due under Louisiana law.

A. Applicable Louisiana Law

Louisiana's doctrine of *res judicata* was substantially altered in 1990 by LSA-R.S. 13:4231, which now "provides a broad application of *res judicata*; the purpose is to foster judicial efficiency and protect the defendants from multiple lawsuits." *Jackson v. North Bank Towing Corp.*, 213 F.3d 885, 888 (5th Cir. 2000). "The statute was amended in 1990 to make a substantive change in the law: a judgment bar to all causes of action arising out of the same occurrence." *Id.* [15]

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[15] Along with LSA-R.S. 13:4231, La. Code Civ. Proc. art. 425(A) was amended in 1991 to provide: "A party **shall** assert all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation." *Id.* (Emphasis added.) "This amendment expands the scope of this Article to reflect the changes made in the defense of *res judicata* and puts the parties on notice that all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation must be raised." Art. 425(A), Revision Comments.

In *Terrebonne Fuel & Lube, Inc. v. Placid Refining Co.*, 95-0654 (La. 1/16/96), 666 So.2d 624, the Louisiana Supreme Court held that under LSA-R.S. 13:4231:

> The central inquiry is not whether the second action is based on the same cause or cause of action (a concept which is difficult to define) but whether the second action asserts a cause of action which arises out of the transaction or occurrence which was the subject matter of the first action. This serves the purpose of judicial economy and fairness by requiring the plaintiff to seek all relief and to assert all rights which arise out of the same transaction or occurrence. 666 So.2d at 632.

Additionally, under Louisiana law of *res judicata*, once a court of competent jurisdiction decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue in a different cause of action between the same parties. *Id.*; LSA-R.S. 13:4231(3).

In Louisiana, application of *res judicata* is **mandatory**, not discretionary. *Avenue Plaza, L.L.C. v. Falgoust*, 96-0173 (La. 7/2/1996), 676 So.2d 1077, 1080; *Mandalay Oil & Gas, L.L.C. v. Energy Development Corp.*, 2001-0993, 6 (La. App. 1 Cir. 2002) 2002 WL 1434422, 3; *Leon v. Moore*, 98-1792 (La. App. 1 Cir. 4/1/99), 731 So.2d 502, 505, *writ denied*, 99-1294 (La. 7/2/99), 747 So.2d 20. Furthermore, pursuant to a separate Louisiana law on *Lis Pendens*, which is also **mandatory**, whether or not a defendant files a motion seeking dismissal of concurrent suits on the same transaction or occurrence between the same parties, the first final judgment "shall be" conclusive. La. Code Civ. Proc. art. 531.

Because it is mandatory, and also by express permission of La. Code Civ. Proc. art. 2163, *res judicata* may be raised at any time, even in the Louisiana Supreme Court. *Lewis v. Lewis*, 155 La. 231, 99 So. 202 (La. 1923); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Cagle*, 94-322 (La. App. 3d Cir. 11/2/94), 649 So.2d 642, *writ denied*

94-2932 (La. 3/17/95), 651 So.2d 266. When there is a dispute over the facts necessary for application of *res judicata*, remand to the trial court is appropriate. *Lewis v Lewis, supra,* 99 So. 202; *Mandalay Oil & Gas, L.L.C. v. Energy Development Corp., supra;* p. 3; *Cagle, supra,* 649 So.2d at 651; *Stansell v. Stansell*, 622 So.2d 1203, 1205 (La. App. 2d Cir. 1993).

B. The Fifth Circuit Failed To Apply Louisiana Law On *Res Judicata*.

The Fifth Circuit failed to apply Louisiana law on *res judicata* in five important respects:

1. First, the Fifth Circuit erred in determining that the Jefferson Parish decision was final for purposes of *res judicata* on the date the Louisiana trial court ruled or at latest on the date of the court of appeal decision, and that Petitioners should have filed a formal motion in the district court.[16] To the contrary, it is clear that in Louisiana, a decision that has been **suspensively** appealed and then brought before the Louisiana Supreme Court is not final and valid for purposes of *res judicata* until the Supreme Court has denied writs.

The *res judicata* statute applies to judgments that are "valid and final." LSA-R.S. 13:4231. As to the date on which a judgment is considered "valid and final," Louisiana law provides that a suspensive appeal **suspends** the

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[16] The Fifth Circuit relied on Comments to LSA-R.S. 13:4231 indicating that a judgment may be final for purposes of *res judicata* when rendered by the trial court. The Comments to this provision are not law. Section 4 of Acts 1990, No. 521, which amended this statute, provides: "The . . . comments in this Act are not part of the law and are not enacted into law by virtue of their inclusion in this Act." *Id.* Moreover, the Comments do not address separate provisions of Louisiana law that govern suspensive appeals, or accurately reflect Louisiana caselaw, discussed *infra*.

effects of a judgment. La. Code Civ. Proc. art. 2123. This suspension of the effects and finality of a trial court judgment **continues** until the Louisiana Supreme court has denied writs. See *Avenue Plaza, L.L.C. v. Falgoust, supra,* 676 So.2d 1077, 1079: "the court of appeal judgment becomes final and definitive when the supreme court denies the application for certiorari." *Id.*; R. A. Stetter, Louisiana Appellate Practice Handbook, Sec. 6.6, p. 6-5 (1996): "A timely application for a writ of certiorari to the Louisiana Supreme Court suspends the finality of the judgment until the date of denial . . . of the application by the Supreme Court." *Id.* [17]

In Louisiana, a judgment cannot be raised as *res judicata* until it is **final** and **unappealable**. *Dupre v. Floyd,* 2001-2399 (La. App. 1 Cir. 7/1/2002), 825 So.2d 1238, 1241, citing *Mente & Co. v. Anciens Etablissements Verdier-Dufour & Cie,* 177 La. 829, 149 So. 492, 493 (1933) (judgment from which appeal was taken was not a "final judgment" for purposes of *res judicata*); *Richmond v. Newson,* 24 So.2d 174, 175 (La. App. 2d Cir. 1945) ("To constitute *res judicata* a judgment of necessity must have become final; no appeal therefrom may be possible.").

Indeed, as the Louisiana District Court in the Terrebonne Parish case correctly found, the Jefferson Parish judgment was "final and valid" for purposes of *res judicata* when the Louisiana Supreme Court denied writs. See, January 27, 2003 Reasons for Judgment, *Mandalay Oil & Gas, L.L.C. v. Energy Development Corp.,* App. 146.

Accordingly, the Fifth Circuit erred in concluding that under Louisiana law the judgment was final for purposes

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[17] La. Code Civ. Proc. art. 2166(E) further provides: "a judgment of the court of appeal becomes final and definitive when the supreme court denies the application for certiorari." La. Code Civ. Proc. art. 2167 provides: "A judgment of the supreme court becomes final and definitive when the delay for application for rehearing has expired and no timely application therefor has been made." *Id.*

of *res judicata* prior to the date the Louisiana Supreme Court denied writs, which occurred during this appeal.

2. Second, the Court erred in applying federal rather than state law to determine the timeliness of Petitioners' Motion. Under Louisiana law, *res judicata* is **mandatory**, not discretionary. *Mandalay Oil & Gas, L.L.C. v. Energy Development Corp., supra*, p. 3; *Leon v. Moore, supra,* 731 So.2d at 505. Furthermore, under Louisiana law of Lis Pendens, whether or not a defendant objects to multiple suits, "the first final judgment rendered **shall be** conclusive of all," La. Code Civ. Proc. 531 (emphasis added). Because these provisions are mandatory, and also pursuant to La. Code Civ. Proc. 2163, an exception of *res judicata* may be raised **at any time**, even in the Louisiana Supreme Court. See, *Lewis v. Lewis, supra,* 99 So. 202; *Cagle, supra,* 649 So.2d 642. Therefore, under substantive Louisiana law, Petitioners' motion was timely.

3. Third, assuming that the Court was correct in determining that factual disputes prevented application of *res judicata* asserted on appeal, which Petitioners dispute, the Court erred in refusing to remand the case, as would a Louisiana court. Under state Supreme Court and Circuit Court decisions, as well as the Terrebonne Parish court's decision on identical facts, remand is appropriate to resolve any factual disputes regarding *res judicata*. See, *Lewis v. Lewis, supra,* 155 La. 231, 99 So. 202 (remanding for consideration of plea of *res judicata*); *Cagle, supra,* 649 So.2d 642, 651 (same); *Stansell v. Stansell*, 622 So.2d 1203, 1205 (La. App. 2d Cir. 1993) (same).

Indeed, in the concurrent Terrebonne Parish proceeding, in which Petitioners' identical exception of *res judicata* was also filed on appeal, the court of appeal remanded the case to the trial court, which granted Petitioners' exception of *res judicata* on identical facts. App. 142. Therefore, properly applying Louisiana law of *res judicata*, this case should have been remanded to determine any alleged factual disputes.

4. Fourth, although Petitioners briefed the matter, the Fifth Circuit failed to apply Louisiana law on claim preclusion and "claim splitting," pursuant to which claims based on subject matter involving the same "transaction or occurrence" **must be** asserted in the same proceeding. Under Louisiana law, the claims in federal court were clearly based on the same "transaction or occurrence" as the claims in the state court suit, and were barred by the first final judgment.

Both the state and federal cases involved identical core issues – the effect of the same 1966 deed and 1971 Mineral Conveyance on the ownership of mineral rights on the St. Martins' property.[18] EDC could have, but did not, assert all of its claims regarding the validity and effect of the 1966 deed and 1971 Mineral Conveyance in the state court suit. Instead, it chose to split its claims, no doubt in an attempt to forum shop, and filed virtually identical suits in different forums, which is clearly prohibited under LAS-R.S. 13:4231(2) and La. Code Civ. Proc. art. 425(A).

Suits involving the effects of the same instruments are based upon the same "transaction or occurrence" under Louisiana law. In *Avenue Plaza, L.L.C. v. Falgoust,* 96-0173 (La. 7/2/96), 676 So.2d 1077, the Louisiana Supreme Court specifically held that the "transaction or occurrence" that was the subject matter of the prior suit for eviction was the legal effect of a document on third parties, i.e., "whether an unrecorded lease renewal option was binding on a third party purchaser," and found that the first decision barred a second action for declaratory judgment involving the same document:

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[18] Even if, as the Fifth Circuit erroneously held, the Jefferson Parish decision affected only the property in the "protective area," according to the federal district court's own opinion in this case, and by agreement of EDC, the ownership of mineral rights in the "protective area" under the 1966 deed and 1971 Mineral Conveyance was also a primary issue in the federal suits. See, n.6 *supra*; App. 24.

> The declaratory judgment action asserted a cause of action which arose out of the transaction which was the subject matter of the eviction suit (i.e., whether an unrecorded lease renewal option was binding on a third party purchaser). Therefore, the issue presented by the declaratory judgment action was determined by the court of appeal in the eviction suit. Accordingly, the doctrine of *res judicata* precluded re-litigation of the same question in the declaratory judgment action. 676 So.2d at 1080.

As such, under Louisiana law of *res judicata*, the federal claims, which arose out of the same "transaction or occurrence," could have and should have been asserted in the prior state court proceeding, and are barred by the prior final state court judgment.

5. Fifth, the Fifth Circuit misapplied Louisiana and federal law, and also erred as a matter of fact, in concluding that issue preclusion did not bar the suit. It is beyond peradventure that the dispositive issues in the federal suits were actually litigated and determined in the state court suit, and were essential to that judgment.

The Fifth Circuit's conclusion that the Jefferson Parish Court's decision as to the invalidity of the 1971 Mineral Conveyance was not necessary to its decision was clearly wrong and also directly contrary to the Louisiana court's resolution of the issue of *res judicata* in the Terrebonne Parish case,[19] in which the court found that:

> The Jefferson Parish Judgment was based on its determination that the 1971 Mineral Conveyance *did not* create mineral rights or servitudes that ultimately favored EDC and that the

[19] Again, the Fifth Circuit knew that this decision on the exact same issues was pending in state court, and despite Petitioners' request for the Court to wait, nevertheless denied Petitioners' Petition for Rehearing prior to the time the Court ruled.

> property description in the 1971 Mineral Conveyance *was not* adequate to affect third parties. These issues actually were litigated in the Jefferson Parish proceeding and both were resolved against EDC. The resolution of both of these issues was essential to the Jefferson Parish decision; a contrary ruling with regard to both issues necessarily would have resulted in a judgment in favor of EDC." *Id.* at p. 4; App. 147.

The Fifth Circuit failed to recognize that a decision in EDC's favor on the validity of the 1971 Mineral Conveyance and the alleged contiguity of the property would have required a ruling in favor of EDC, both as to prescription within the protective area, and as to EDC's claim of ownership of mineral rights outside the protective area. Therefore, these rulings were "essential" to the judgment.

Furthermore, even assuming, but not conceding, that the Fifth Circuit was correct in determining that the only preclusive portion of the Jefferson Parish Court's decision was its determination that EDC had no mineral rights in the "protective area," applying this holding **required** a decision for Petitioners, under the terms of the federal district court's opinion, because carving out the lands in the protective area meant that the servitude was not contiguous and that drilling activity on one tract would not interrupt prescription as to the tracts at issue.

However, the Fifth Circuit decided that pursuant to federal law, a "factual dispute" precluded application of the doctrine of *res judicata* on appeal. This "factual dispute" was based on an alternative argument raised by EDC that a small 41' corridor maintained contiguity of the property conveyed by the 1971 Mineral Conveyance,[20] upon which

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[20] The court in the Jefferson Parish case expressly rejected this argument. App. 127-128. EDC, as plaintiff, had the burden of proof, and also had the burden under Louisiana property law to establish the

(Continued on following page)

claim the federal district court did not rule, and therefore implicitly rejected.[21]

The Fifth Circuit's decision to create a "factual issue" barring application of *res judicata* out of an alternative argument that EDC had the burden to prove and which the Jefferson Parish court and federal district court rejected, was clear error. At the very least, the Court should have remanded for determination of this alleged factual dispute in accord with Louisiana law on *res judicata*.

In sum, the Fifth Circuit's decision, which failed to afford the Jefferson Parish decision the same preclusive effect as Louisiana courts, was contrary to the Full Faith and Credit Act, the *Erie* doctrine and numerous decisions of this court, meriting a writ.

C. Alternatively, The Fifth Circuit Erred In Applying Federal Law.

Alternatively, the Court erred in holding that Petitioners did not adequately raise the issue of *res judicata* in the district court under federal law. Under federal law, the issue of *res judicata* may be raised by Answer, Fed. R. Civ. P. 8(c), at trial or by motion, even motions on other issues, See, *e.g.*, *Westwood Chemical Co., Inc. v. Kulick*, 656 F.2d 1224 (6th Cir. 1981) (*res judicata* properly raised by motion to quash subpoena).

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boundaries of its alleged servitude, but simply failed to prove the boundaries or the existence of the alleged 41' corridor. EDC did not even obtain a survey of the property. As such, the "factual dispute" was at best a lack of evidence that would have been fatal to EDC's claim, had the court considered it.

[21] See, *e.g.*, *U.S. for Use and Ben. of Howell Crane Service v. U.S. Fidelity & Guar. Co.*, 861 F.2d 110, 113 (5th Cir. 1988) (district court implicitly rejected claim when it chose not to rule on it).

Petitioners cited the pending proceedings in both state courts in their Amended Answer (I R. 41, 44); filed a motion requesting the federal district court to continue the trial without date until the conclusion of the state court proceedings (I R. 3, 8, 14-15); and filed two motions requesting the Court to abstain on the basis of the state court proceedings. I R. 242; 252-260. Moreover, the existence of the Jefferson Parish Judgment was listed as a defense in the Pre-Trial Order, II R. 945, and was discussed during the trial.

As such, the Fifth Circuit's decision that the issue was not raised in the district court conflicts with federal, as well as Louisiana law, meriting a writ.

IV. THE DECISION DIRECTLY CONFLICTS WITH LOUISIANA LAW AND WILL PROMOTE FORUM SHOPPING AND INEQUITABLE ADMINISTRATION OF STATE LAW IN VIOLATION OF *ERIE RAILROAD CO. V. TOMPKINS* AND PROGENY, MERITING A WRIT.

It is well settled that federal courts must apply the law of the state in which they sit, except in matters governed by the Federal Constitution or by Acts of Congress. *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). As a policy matter, the "twin aims" of the Erie rule are: "discouragement of forum shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer,* 380 U.S. 460, 468, 85 S.Ct. 1136, 1142, 14 L.Ed.2d 8 (1965).

In determining the content of the state law to be applied, the underlying substantive rule involved is based on state law, and the state's highest court is the best authority on its own law. If there is no decision by that court then federal authorities must apply what they find to be the state law after giving "proper regard" to relevant rulings of other courts of the state. *Hulin v. Fibreboard Corp.,* 178 F.3d 316, 318-19 (5th Cir. 1999), citing *Commissioner v.*

Estate of Bosch, 387 U.S. 456, 465, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967).

In the instant case, the district court failed to apply substantive Louisiana law as decided on the exact legal issues herein by the Louisiana courts. The Fifth Circuit failed to even address these substantive errors of law, or the conflict with the *Erie* doctrine.

The Louisiana Supreme Court denied writs in the Jefferson Parish state court case, and that case, regarding the interpretation and validity of the conveyances and servitudes under Louisiana law, particularly the conclusion that the 1971 Mineral Conveyance was invalid under Louisiana law, should have been followed. Moreover, the district court clearly failed to apply controlling Louisiana law on property and servitudes set forth by the Louisiana Supreme Court.

First, the Louisiana Supreme Court has specifically held that while an "omnibus" or "in globo" description may be valid between the parties, such a description is not sufficiently specific to give notice to third parties. *Williams v. Bowie Lumber Co.,* 214 La. 750, 38 So.2d 729 (1948); *Daigle v. Calcasieu Nat'l Bank,* 200 La. 1006, 9 So.2d 394 (1942).

Second, the Louisiana Supreme Court has set forth the following controlling rule of law for determining the sufficiency of a property description:

> The description in a deed must be such that the property intended to be conveyed can be located and identified, and the general rule is that the description must fully appear within the four corners of the instrument itself, or that the deed should refer to some map, plat, or deed as a part of the description, so that the same may be clear.

Daigle, supra; *Cupples v. Harris,* 202 La. 336, 11 So.2d 609 (1942).

Neither the 1971 Mineral Conveyance nor the referenced 1944 mortgage met these requisites. The district

court even admitted that EDC did not establish the boundaries of its alleged servitude.

Third, it is well settled in Louisiana law that extrinsic or parol evidence is not admissible against third parties. LSA-R.S. 9:2721. Parol evidence could not be used by EDC to establish a title against Petitioners, who are third parties. *Blevins v. Manufacturers Record Publishing Co.*, 235 La. 708, 105 So.2d 392 (1958). Yet, the district court permitted EDC to do so.

Fourth, the district court's decision is also incompatible with *Hicks v. Clark,* 225 La. 133, 72 So.2d 322, 325 (1954); *LeBleu v. LeBleu,* 206 So.2d 551, 554 (La. App. 3rd Cir. 1967), and other authorities that prohibit contractual arrangements extending or circumventing prescription based on 10 years non-use. 72 So.2d at 325. The rationale of *Hicks* has been codified in Article 76 of the Louisiana Mineral Code, LSA-R.S. 31:76.

Finally, the court failed to apply La. Civil Code Art. 730 on interpretation of servitudes, which specifically provides: "Doubt as to the existence, extent, or manner of exercise of a predial servitude shall be resolved in favor of the servient estate." *Id.* [22]

In sum, in violation of *Erie*, the district court and the Fifth Circuit failed to apply the substantive law of Louisiana, as reflected in the final and definitive state court decision on the very issues in this case, and settled Louisiana law relating to servitudes and property descriptions. The decision will promote forum shopping and inequitable administration of state law in mineral rights and property cases. Accordingly, Petitioners respectfully request that

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[22] Under this article, "Servitudes claimed under titles, are never sustained by implication – the title creating them must be express, as to their nature and extent, as well as to the estate to which they are due." Comment (c), La. Civil Code Art. 730, citing *Buras Ice Factory, Inc. v. Department of Highways,* 235 La. 158, 103 So.2d 74 (1958).

this Court grant the writ and ultimately reverse the federal courts' legally erroneous decision on the merits as to all Petitioners.

V. THE FIFTH CIRCUIT'S FAILURE TO REVIEW AND REVERSE THE DISTRICT COURT'S ERRONEOUS DETERMINATIONS OF STATE LAW VIOLATES ITS DUTY AS A REVIEWING COURT AND CONFLICTS WITH *SALVE REGINA COLLEGE V. RUSSELL*, MERITING A WRIT.

Despite Petitioners' request, the Fifth Circuit did not review the merits of the district court's decision. Petitioners respectfully submit that the Court's failure to review and reverse the district court's erroneous determinations of Louisiana law, is contrary to its duties as a reviewing Court and this Court's decision in *Salve Regina College v. Russell,* 499 U.S. 225, 111 S.Ct. 1217, 113 L.Ed.2d 190, (1991), which requires the courts of appeal to conduct *de novo* review of a district court's findings of state law, meriting a writ.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JOHN MAMOULIDES
3421 N. Causeway Blvd.,
Suite 601
Metairie, LA 70002

A. J. GRAY, III*
THE GRAY LAW FIRM
P.O. Box 1467
Lake Charles, LA 70602
Tel: (337) 494-0694

**Counsel of Record*

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 01-30266

ENERGY DEVELOPMENT CORPORATION

Plaintiff-Appellee

VERSUS

MICHAEL X. ST. MARTIN; VIRGINIA RAYNE ST. MARTIN; QUALITY ENVIRONMENTAL PROCESSES, INC.

Defendant-Appellants

THE LOUISIANA LAND AND EXPLORATION COMPANY

Defendant-Counter Plaintiff

VERSUS

SAMUEL J. STAGG, III, M.D.; husband of; JULIE M. STAGG; JAMES G. FISTER, husband of; LINDA F. FISTER; BAYOU AREA CHILDREN'S FOUNDATION, INC.

Counter Defendants-Appellants

ENERGY DEVELOPMENT CORPORATION

Plaintiff-Appellee

VERSUS

MICHAEL X. ST. MARTIN; VIRGINIA RAYNE ST. MARTIN; QUALITY ENVIRONMENTAL PROCESSES, INC.

Defendant-Appellants

Appeal from the United States District Court
For the Eastern District of Louisiana, New Orleans
99-CV-1793-A

ON PETITION FOR REHEARING

(Filed Jun. 27, 2002)

Before GARWOOD, JOLLY, DAVIS, Circuit Judges.

PER CURIAM:

In response to the defendants' petition for rehearing, we substitute the following in place of the opinion as originally issued:*

We AFFIRM the judgment of the district court essentially on the basis of its careful Memorandum Opinion dated December 12, 2000. For the reasons stated below, we decline to consider the res judicata defense which is raised for the first time on appeal.

I.

Energy Development Corporation ("EDC") filed two actions (later consolidated) seeking a declaratory judgment establishing its ownership of mineral rights underlying property located in the Lake Hatch – Sunrise Field area of Terrebonne Parish, Louisiana. The defendants in only one of the cases – CA 98-3395 – have asserted a res judicata defense. These defendants, the St. Martin Group

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* This opinion does not resolve the petition for rehearing en banc which is pending before the court.

(Michael X. St. Martin; Virginia Rayne St. Martin; Quality Environmental Processes, Inc.), who are surface owners of a 170 acre tract of land also claim ownership of minerals underlying that property. The St. Martin Group conceded at trial the existence of certain instruments filed of record upon which EDC bases its claim of a mineral servitude. However, they disagree with EDC's interpretation of those instruments as to when and whether they were effective to convey mineral servitudes to EDC. They also argue that any mineral servitude conveyed has prescribed and the minerals have reverted to them as surface owners of the land.

Plaintiff EDC's claim of ownership of the minerals at issue is based on a Mineral Conveyance dated May 3, 1971, effective January 1, 1971 (the "1971 Mineral Conveyance"), to its predecessor Pelto Oil Company ("Pelto"). In that transaction, EDC contends that Pelto acquired a single, large contiguous mineral servitude covering the tracts at issue in this case and other lands and that the servitude has been maintained by operations and production on the contiguous acreage described in the 1971 Mineral Conveyance. The defendant surface owners dispute EDC's ownership of mineral rights citing (1) a 1966 conveyance of minerals which they claim included an area which severed the contiguity of any servitude EDC/Pelto acquired in 1971, (2) ten year prescription of non-use, and (3) their claim that the description in the 1971 Mineral Conveyance was inadequate to convey anything to EDC's predecessor in title. EDC counters that the 1966 mineral conveyance, even if effective as claimed by the St. Martin Group, does not sever the servitude it acquired in 1971.

A brief history of the chain of title is required to understand the issues. In 1966, Southdown, Inc. conveyed to Southdown Exploration, Inc. a mineral servitude covering eight tracts of land, one of which was an area designated as the "Productive Area", (the "1966 Mineral Conveyance"). In addition to transferring title to the minerals in the Productive Area, the 1966 Mineral Conveyance obligated Southdown to convey to Southdown Exploration mineral rights as to certain listed sands within an area described as the "Protective Area" if production were achieved from them (the "Protective Area Clause").[2] The Protective Area surrounds the Productive Area on three sides. In 1970, Southdown, Inc. conveyed to Southdown Lands, Inc. fee title to properties listed on an Exhibit A to that instrument (the "1970 Mineral Conveyance"). Exhibit A described the

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[2] The Protective Area Clause reads as follows:

> As an essential and integral part of the consideration paid for this conveyance, Grantor binds and obligates itself to convey to Grantee, from time to time as required, all of its right, title and interest in and to the oil, gas and other minerals in each Known Productive Sand when and if such sand is established to be productive or capable of production in the Protective Area. . . . If and when any Known Productive Sand is established to be productive or capable of production within the Protective Area as above provided, Grantor shall then be obligated to convey to Grantee the mineral rights in such Known Productive Sand as to the entirety of that Protective Area. . . . Each obligation to make such additional mineral conveyances as to Known Productive Sands shall arise immediately and automatically whenever any Known Productive Sand is established to be productive or capable of production in any portion of the Protective Area as provided above . . . As heretofore provided, conveyances shall be made from time to time whenever the conditions set forth above shall occur . . .

properties conveyed by reference to previously recorded documents, including a 1944 Mortgage by a prior owner in the chain of title, Realty Operators, Inc. The described property included the Productive Area, the Protective Area and surrounding areas.

Southdown Lands, Southdown, Inc., and Realty Operators (but not Southdown Exploration, the transferee in the 1966 Mineral Conveyance) are all predecessors in title to all parties to this litigation. In 1971, Southdown Lands conveyed to EDC's predecessor, Pelto Oil Company ("Pelto"), a mineral servitude which EDC asserts covers a large contiguous tract which surrounds the Productive Area, includes the Protective Area and encompasses all tracts in this case (the "1971 Mineral Conveyance"). The conveyance excepted interests that had been previously conveyed. St. Martin Group contends that the servitude in the Protective Area was conveyed in 1966 and therefore that property was excepted from the 1971 conveyance. The 1971 Mineral Conveyance contained no property description, but rather incorporated by reference the 1970 Conveyance, which as stated above incorporated the description from the 1944 Mortgage. The 1944 Mortgage describes the tracts at issue by section, township, plantation name, and by frontage on the bayou and adjacent lands.

EDC contends that the large contiguous mineral servitude it acquired in 1971 covering the Protective Area, the tracts at issue in this case and other lands has been maintained by operations and production on the acreage

described in the 1971 Mineral Conveyance.[3] The defendant surface owners (including the St. Martin Group) dispute EDC's ownership of mineral rights on a number of grounds. First, they argue that EDC did not acquire any minerals in the Protective Area in the 1971 Mineral Conveyance, based on their conclusion that the Protective Area had been previously conveyed to others in the 1966 Mineral Conveyance. Second, they argue that excepting the Protective Area from the area conveyed to EDC/Pelto in 1971 severs the area into two noncontiguous mineral servitudes: an area to the south of the Protective Area on which mineral operations were conducted and an area to the northeast of the Protective Area on which the defendants' surface tracts are located. According to St. Martin, this is significant because once the Protective Area is excluded from EDC's servitude and the servitude is severed, mineral operations on the southern portion of the tract could not maintain the servitude on defendants' acreage located to the northeast of the Protective Area. Third, the defendants argue that the property description in the 1971 Mineral Conveyance was inadequate to convey anything to EDC's predecessor in title.

Assuming that defendants are correct that the Protective Area was conveyed to others in 1966, so that the Protective Area is excluded from the 1971 Mineral Conveyance, EDC argues that its servitude remains intact and is not severed. EDC argues that it established a 41 foot corridor along the section line between Sections 59 and 60

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[3] Under Louisiana law, operations anywhere on a servitude will maintain the entirety of a contiguous servitude. La. R.S. 31:63. A mineral servitude prescribes after ten years of non-use. La. R.S. 31:27.

that connects the northeastern part of the larger servitude with the southern portion. All parties agree that if EDC establishes a single contiguous servitude, operations on the southern portion of the servitude would be sufficient to maintain the entire servitude. The first important issue presented to the district court was whether the 1966 Mineral Conveyance conveyed the property it described as the Protective Area.

The district court found that the language of the 1966 Mineral Conveyance created a contingent obligation to convey, not a present conveyance of a mineral interest. Thus, it found that no mineral interests were conveyed in the Protective Area by the 1966 Mineral Conveyance and the Protective Area was included within the area conveyed to EDC/Pelto in the 1971 Mineral Conveyance. The district court also found that the description in the 1944 mortgage, which description was incorporated by reference into the May 3, 1971 Mineral Conveyance, was sufficient to convey immovables under applicable Louisiana law. Based on this premise, the court found that mineral activities in the southern portion of the contiguous tract maintained the servitude on the entire tract, including the St. Martin Group's property. Accordingly, it awarded judgment in favor of EDC on all issues. The defendants appeal and, relevant to our discussion here, raise the defense of res judicata for the first time on appeal.

II.

During the pendency of this case in the district court, two suits between some (but not all) of the parties in this suit were proceeding in two separate Louisiana state courts, one in Terrebonne Parish and one in Jefferson

Parish.[4] The St. Martin Group asserts the judgment in the Jefferson Parish suit as res judicata over this federal action. EDC and the St. Martin Group were parties to the Jefferson Parish case. The Jefferson Parish court was presented with the question of mineral ownership of property different from the property at issue in these consolidated cases. The mineral servitude in question in that suit was located entirely within the Protective Area. The Jefferson Parish Court's decision differed with the court below in three important respects. The Jefferson Parish court concluded that: (1) The 1966 mineral conveyance effectively conveyed to third parties a mineral servitude and other mineral rights in the Protective Area of the Sunrise Field, (2) the mineral servitudes or mineral rights conveyed by the 1966 Mineral Conveyance have been extinguished by prescription based on ten (10) years nonuse, and these interests have reverted to the surface owners, and (3) the omnibus property description based on the 1944 mortgage and attached as Exhibit 'A' to the May 3, 1971 mineral conveyance was not an adequate description to effect a conveyance of the property described in the 1944 mortgage. (The Terrebonne Parish Court reached the

[4] Prior to the institution of these suits in federal court, Energy Development corporation initiated a suit captioned Energy Development Corporation v. Quality Environmental Processes, Inc., Michael X. St. Martin and Virginia Rayne St. Martin, No. 511546, 24th Judicial District Court, Jefferson Parish Louisiana. Energy Development Corporation and the St. Martin Group were also named as defendants in a concursus proceeding filed by Mandalay Oil & Gas, L.L.C. and Voyager Petroleum, Inc., No. 123320, 32nd Judicial District Court, Terrebonne Parish, Louisiana.

opposite conclusion in the suit proceeding in that jurisdiction; it agreed with the decision in the federal district court.)[5]

In contrast to the final judgment in the Jefferson Parish case, initial proceedings were in favor of EDC. In June 1998, the Jefferson Parish court found in favor of the St. Martin Group on Summary Judgment. The Louisiana 5th Circuit reversed and remanded in May, 1999. In its

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[5] Judgment in the Terrebonne Parish suit was entered in favor of EDC on September 29, 2000. That case is currently on appeal to the Louisiana 1st Circuit Court of Appeal. The Terrebonne Parish case was a concursus proceeding to resolve the ownership of minerals as to a tract of land located partially within and partially outside the Protective Area. EDC and the St. Martin Group were among the parties to that litigation. The Terrebonne Parish court held that the Protective Area Clause created a conditional obligation to convey mineral rights subject to a suspensive condition, not a present transfer of a mineral servitude or other mineral right as to the Protective Area. Accordingly, in the 1966 Mineral Conveyance, it held that Southdown, Inc. received a mineral servitude on the Protective Area subject to the obligation to make conveyances of mineral rights as to the listed sands to Southdown Exploration if the listed conditions were met. Southdown, Inc. could then convey its servitude, subject to the obligation, to Pelto by the 1971 Mineral Conveyance. The Terrebonne Parish court also noted that even if the 1966 Mineral Conveyance created a mineral servitude or other mineral right within the Protective Area, it was clear that any such servitude or right would be limited to the twenty "Known Productive Sands" listed in the 1966 Mineral Conveyance as to which the Protective Area Clause applied. Such horizontal division would not prevent the 1966 Mineral Conveyance from conveying a mineral servitude as to all other horizons within the Protective Area to Southdown, Inc. Horizontal stratification of the servitude within the Protective Area would not prevent contiguity with the remainder of the servitude conveyed in the 1971 Mineral Conveyance. It also rejected the St. Martin Group's claim that the 1971 Mineral Conveyance failed to create a mineral servitude in favor of Pelto/EDC for lack of an adequate property description.

first opinion in this case, 734 So. 2d 965 (La. Ct. App. 5 Cir. 1999), the Louisiana 5th Circuit found the 1966 Mineral Conveyance conveyed only "a conditional future interest in the listed sands" and that because "the 1966 obligation was limited to specific sands in the Protective Area," it found that "there still existed mineral rights capable of being alienated in the Protective Area by the 1971 conveyance." However, it remanded for further proceedings to resolve "questions of material fact as to the nature, extent and prescription of EDC's mineral rights in the Protective area (the St. Martin's Tract) pursuant to the 1971 conveyance," more specifically, "whether the drilling activity described in the Hebert affidavit (the 36 wells) over the whole of the 1971 conveyance area interrupts prescription of the mineral rights granted by the 1971 conveyance on the St. Martin tracts." On remand, the Jefferson Parish court heard additional evidence and entered the judgment described above on December 17, 1999. EDC appealed and the Louisiana Fifth Circuit affirmed on December 4, 2000, 777 So. 2d 481 (La. Ct. App. 5 Cir. 2000). This was eight days before the district court issued its Memorandum Opinion in this case on December 12, 2000 and over a month before it entered judgment on January 17, 2001. The Louisiana Supreme Court denied EDC's application for writs on March 9, 2001. 786 So. 2d 734 (La. 2001)

Based on this chronology, the St. Martin Group could clearly have raised their res judicata defense before the district court. Comment (d) to Louisiana's res judicata statute, La.R.S. 13:4231, states that a final judgment is one which disposes of the merits of the case in whole or in part. Therefore, "the preclusive effect of a judgment attaches once a final judgment has been signed by the trial

court and would bar any action filed thereafter unless the judgment is reversed on appeal." La.R.S. 13:4231, comment (d). Case law applying this concept appears to distinguish between when a judgment is final for res judicata purposes and when it acquires the authority of a thing adjudged. See *Avenue Plaza, L.L.C. v. Falgoust,* 676 So.2d 1077 (La. 1996) ("The appellate court judgment . . . affirmed the defendant's eviction. That judgment was a final judgment which became res judicata and conclusive between the parties when it was rendered, with the exception of appeal or other direct review. LSA-R.S. 13:4231. The judgment acquired the authority of the thing adjudged and became final and definitive when this court denied certiorari. La. C.C.P. art. 2166D.") See also *Tolis v. Board of Supervisors,* 660 So. 2d 1206, 1207 (La. 1995). Accordingly, the judgment in the Jefferson Parish suit appears to have been final for res judicata purposes as early as December 17, 1999, when the Jefferson Parish court entered judgment in favor of the St. Martin Group and certainly no later than December 4, 2000, when the Louisiana 5th Circuit Court of Appeals affirmed the judgment of the district court. Both of these dates precede the federal district court's decision in this case.

III.

Although the district court record is replete with references to both the Jefferson Parish suit and the Terrebonne Parish suit, the defendants do not argue that they raised the defense of res judicata or collateral estoppel before the district court. Rather, they carefully avoid making this argument and assert that res judicata may properly be considered for the first time on appeal, relying on *Jackson v. North Bank Towing Corp.,* 213 F.3d 885 (5th

Cir. 2000); *Russell v. Sunamerica Secur., Inc.*, 962 F.2d 1169 (5th Cir. 1992); and *American Furniture Co. v. International Accommodations Supply*, 721 F.2d 478 (5th Cir. 1981).

Federal Rule of Civil Procedure 8(c) lists res judicata as one of the defenses that must be affirmatively pled. Our decisions in the above cases start from the premise that failure to raise this defense in the district court generally precludes the district court and appellate courts from considering the defense. *Id.* and *Exxon Corp. v. Texas Motor Exchange, Inc.*, 628 F.2d 500, 507 (5th Cir. 1980). However, these cases also recognize that in a narrow, well-defined class of cases, the defense of res judicata may be considered for the first time on appeal. These cases hold that an appellate court can address res judicata for the first time on appeal, but only to affirm the district court's judgment and only if all of the relevant facts are contained in the record and are uncontroverted. *Jackson*, 213 F.3d at 890-891; *Russell*, 962 F.2d at 1172. St. Martin asserts the defense to reverse the district court.

One decision of this court has allowed a party to assert res judicata for the first time on appeal to reverse a district court judgment. *American Furniture*, 721 F.2d at 482. However, it reiterated the rule that this can only be done "where all of the relevant facts are contained in the record before us and all are uncontroverted." *Id. American Furniture* addressed the conflict between judgments in parallel proceedings in state and federal courts.[6] The

[6] In *American Furniture*, the state court held the American Furniture's asserted vendor's lien on furniture and carpet installed in a hotel ranked after the chattel mortgage on that hotel. *American*

(Continued on following page)

Louisiana state court held that one party's mortgage primed the claims of all intervenors. The judgment of the federal district court held that the vendor's lien of a party, who was also an intervenor in the state suit, primed the mortgage being foreclosed upon in the state court suit. Today's case is distinguishable from *American Furniture* in a number of respects.[7] For reasons we explain below, the most obvious reason *American Furniture* does not require us as an appellate court to apply res judicata when the defense was not asserted in the district court is that facts necessary for the application of the defense are not found in the trial court record and are not uncontroverted.

The record in the district court reveals that the Jefferson Parish suit adjudicated the ownership of minerals underlying a tract of land that the parties stipulated was located entirely within the Protective Area. The tracts at issue in this case lie entirely outside the Protective Area. The 1966 Mineral Conveyance and the 1971 Mineral conveyance appear in the chain of title of all tracts in both cases. Accordingly, the federal action and the Jefferson Parish action have two potential common issues: (a) whether the Protective Area was conveyed in the 1966 Mineral Conveyance, and (b) whether the 1971 Mineral

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Furniture, 721 F.2d at 481. The federal district court held that American Furniture's vendor's lien primed the mortgage. Accordingly, this court was faced with rulings that directly conflicted as to a single property.

[7] Significantly, our district court found that neither the Jefferson Parish suit nor the Terrebonne Parish suit were parallel actions to this proceeding.

Conveyance has an adequate property description.[8] Although the St. Martin Group asserts both claim and issue preclusion, the essence of their request is to have the Jefferson Parish court's interpretation of the 1966 Mineral Conveyance and the 1971 Mineral Conveyance applied to the distinct tracts of land that are the subject of this case. This argument triggers section (3) of the Louisiana statute, which provides:

> Issue preclusion applies only to an issue actually litigated and determined and then only if the determination of that issue was essential to the judgment.

La. R.S. 13:4231.

The Jefferson Parish court addressed both common issues noted above. However, it is apparent from the face of the Jefferson Parish Judgment and Reasons for Judgment that the only issue essential to the judgment was the court's conclusion that the mineral rights burdening the Protective Area arose from the 1966 Mineral Conveyance, rather than the 1971 Mineral Conveyance. Once that decision was made, the Jefferson Parish court was able to conclude that the mineral rights at issue had prescribed based on ten years of nonuse and award judgment to the St. Martin Group. This is true because of two uncontroverted facts: (1) the property in the Jefferson Parish case was located entirely within the Protective Area, and (2) no production or drilling activity had been conducted between 1966 and 1976 to interrupt prescription of the servitude

[8] It appears that the Terrebonne Parish suit has the same common issues.

within the Protective Area. The Jefferson Parish court's interpretation of the 1971 Mineral Conveyance was therefore unnecessary to its conclusion.

Accordingly, in this case, the only potential preclusive effect of the Jefferson Parish judgment is its conclusion that the 1966 Mineral Conveyance conveyed mineral rights in the Protective Area. Applying that determination to this case would require us to treat that area as excepted from the servitude conveyed in the 1971 Mineral Conveyance. But accepting this determination does not clearly change the result reached by the court below, because a factual dispute remains as to whether removing the Protective Area from EDC's servitude severs the servitude into two noncontiguous tracts. EDC produced evidence that contiguity was maintained because a narrow 41 foot corridor connects the southern and northwestern portions of the property subject to the servitude.

EDC argued in the district court (and in this court) that contiguity between these tracts was maintained by this corridor. This argument is based on evidence that the western boundary of Waterproof Plantation, which is also the western boundary of EDC's servitude in that area, extends 41 feet to the west beyond the west section line of Section 60, Township 17, Range 16 East into Section 59, Township 60, Range 16 East. Because the district court found that no transfer was effected by the 1966 instrument it was unnecessary for the district court to resolve this issue. The district court's opinion observes, however, that this boundary, (though not the depth of the extension into Section 59), was established by the testimony of the defendant's expert. The defendants counter that their expert provided actual surveys negating plaintiff's claims of one contiguous property. As far as we can tell from the

various opinions issued in the Jefferson Parish case, this issue was never presented or considered in that lawsuit.

This factual dispute precludes application of issue preclusion in this case. Our cases allowing consideration of res judicata or collateral estoppel on appeal do so only if "all of the relevant facts are contained in the record and are uncontroverted." As that is not the case here, we decline to consider the defendants' assertion of res judicata or collateral estoppel at this stage of the litigation.

The petition for panel rehearing and all other outstanding motions in this case are DENIED.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 01-30266

ENERGY DEVELOPMENT CORPORATION

Plaintiff-Appellee

VERSUS

MICHAEL X. ST. MARTIN; VIRGINIA RAYNE ST. MARTIN; QUALITY ENVIRONMENTAL PROCESSES, INC.

Defendant-Appellants

THE LOUISIANA LAND AND EXPLORATION COMPANY

Defendant-Counter Plaintiff

VERSUS

SAMUEL J. STAGG, III, M.D.; husband of; JULIE M. STAGG; JAMES G. FISTER, husband of; LINDA F. FISTER; BAYOU AREA CHILDREN'S FOUNDATION, INC.

Counter Defendants-Appellants

ENERGY DEVELOPMENT CORPORATION

Plaintiff-Appellee

VERSUS

MICHAEL X. ST. MARTIN; VIRGINIA RAYNE ST. MARTIN; QUALITY ENVIRONMENTAL PROCESSES, INC.

Defendant-Appellants

Appeal from the United States District Court
for the Eastern District of Louisiana
99-CV-1793

(Filed Feb. 20, 2002)

Before GARWOOD, JOLLY, and DAVIS, Circuit Judges

PER CURIAM:*

We AFFIRM the judgment of the district court essentially on the basis of its careful Memorandum Opinion dated December 12, 2000. The res judicata defense asserted by appellant for the first time on appeal was not timely raised in the district court and therefore is waived.

All outstanding motions in this case are DENIED.

AFFIRMED.

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ENERGY DEVELOPMENT CORPORATION	**CIVIL ACTION**
VERSUS	**NO. 98-3395 c/w 99-1793**
MICHAEL X. ST. MARTIN, VIRGINIA RAYNE ST. MARTIN, AND THE LOUISIANA LAND AND EXPLORATION COMPANY	**SECTION "A"**

MEMORANDUM OPINION

(Filed Dec. 12, 2000)

The captioned consolidated cases, within the diversity jurisdiction of this Court as shown below, came on for bench trial on Monday, May 15, 2000. The clash is over title to mineral rights to certain properties located in the Lake Hatch-Sunrise Field area of Terrebonne Parish which plaintiff Energy Development claims *via* Mineral Conveyance dated May 3, 1971, effective January 1, 1971, recorded under Entry No. 402359 of the records of Terrebonne Parish, Louisiana [EDC Exhibit 26].[1] Essentially,

[1] It is EDC's contention that *via* the such May 3, 1971 Mineral Conveyance, Southdown Lands conveyed to Pelto Oil Company, EDC's predecessor in title, "all of its right, title and interest in and to all oil, gas and other minerals located in, on or under all lands now or formerly owned by Vendor, wherever situated, including but not limited to, the lands listed on the Exhibit attached [to the May 3, 1971 Mineral Conveyance] as Exhibit 'A'. . . . " See, EDC's Exhibit 26.

EDC contends that its predecessor, Pelto Oil Company, acquired a single large contiguous mineral servitude covering the tracts at issue in this case[2] and that its servitude which includes the tracts at issue has been maintained by operations and production on the contiguous acreage described in the May 3, 1971 Mineral Conveyance.

Defendant surface owners dispute EDC's ownership of mineral rights citing conveyances executed in their favor, ten year prescription of non-use, and claiming, *inter alia,* that the May 3, 1971 Mineral Conveyance recites only an ambiguous, omnibus description of the property and thus, conveyed nothing.

As previously noted, the lead case, a declaratory judgment action numbered Civil Action 98-3395 on the docket of this Court, involves a tract of approximately 170 acres upon which the defendant, Louisiana Land and Exploration Co. ("LL & E"), obtained mineral leases from both the plaintiff EDC and the defendant surface owners, Michael X. St. Martin, Virginia Rayne St. Martin, and Quality Environmental Processes, Inc. (hereinafter referred to as "the St. Martin Group"). The consolidated action numbered 99-1793 was also instituted by EDC and involves the existence of a mineral servitude in favor of

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[2] The issue in dispute in these consolidated proceedings is the ownership of minerals underlying two tracts of land in Terrebonne Parish, Louisiana, an approximately 170 acre tract that is the subject of the CA 98-3395 and an approximately 1000 acre tract that is the subject of CA 99-1793, along with two unit tracts in the 88 Reservoir A, Sand Unit A, and 88 Reservoir B Sand Unit A, the surface of said unit tracts being owned by the Staggs and the Pfisters [sic].

EDC on a tract in Terrebonne Parish approximately 1,000 acres in area. The latter suit additionally involves the two unit tracts of defendant surface owners, Bayou Area Children's Foundation, Inc. (the "Foundation"), Samuel Stagg, III, M.D., husband of/and Julie M. Stagg (the "Staggs"), James G. Fister, husband of/and Linda F. Fister (the "Fisters").

I. THE PARTIES – DIVERSITY JURISDICTION

Plaintiff, Energy Development Corporation ("EDC"), seeks a declaration as to the continued existence of its alleged single large contiguous mineral servitude which includes both the 170 acre and the 1000 acre tracts which are the subject of these consolidated cases. EDC also seeks a permanent injunction prohibiting interference with its use and enjoyment of the tracts included in its large contiguous servitude in the Lake Hatch – Sunrise Field area of Terrebonne Parish.

The St. Martin Group and the Bayou Area Children's Foundation (the "Foundation"), the Staggs and the Fisters, counterclaimed against EDC for damages and for judgment declaring that EDC owns no servitude with respect to either the 170 acre tract or the 1,000 acre tract.

Louisiana Land and Exploration Company ("LL & E") maintains it is a disinterested stakeholder, whereas all other defendants dispute the existence and/or viability of entirety and/or portions of EDC's claimed servitude. All of the mineral rights which are the subject of the captioned

consolidated cases are within the "Lake Hatch Field-Sunrise Field" area in Terrebonne Parish, Louisiana.[3]

EDC, albeit presently a Delaware corporation, was a New Jersey corporation with its principal place of business in Oklahoma, at the time of the filing of all of the claims, counter-claims, cross-claims, etc. in the captioned proceedings.[4] The defendant surface owners include the Michael St. Martin, Virginia Rayne St. Martin ("the St. Martins"), Quality Environmental Processes, Inc. ("QEPI"), the Bayou Area Children's Foundation ("the Foundation"), Samuel J. Stagg, III, M.D., Julie M. Stagg ("the Staggs"), James G. Fister and Linda F. Fister ("the Fisters"). Defendant surface owners along with EDC are also defendants with respect to the statutory interpleader filed by the LL & E.

Michael St. Martin, husband of/and Virginia Rayne St. Martin (sometimes hereinafter referred to as the "St. Martins"), are individual defendants who reside in Houma, Louisiana. Defendant, Quality Environmental Processes, Inc. ("QEPI"), is a Delaware corporation with its principal place of business in Louisiana. Bayou Area Children's Foundation, Inc. (the "Foundation") is a Louisiana corporation domiciled in Terrebonne Parish, Louisiana. Samuel Stagg, III, M.D., husband of/and Julie M. Stagg (the "Staggs"), are individuals who reside at 3613

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[3] See, Stipulations, at Section II, the St. Martins' Stipulated Finding of Fact No. 3 (hereinafter referred to St. Martin SFOF) [attached hereto as Addendum A].

[4] See, Stipulations, at Section I, EDC's Stipulated Finding of Fact (hereinafter EDC SFOF), No. 7 and at Section II, St. Martin SFOF No. 1A [Addendum A].

Bayou Black Dr., Houma, Louisiana. James G. Fister, husband of/and Linda F. Fister (the "Fisters") are individuals who reside at 3449 Bayou Black Dr., Houma, Louisiana.[5] All of these defendants aforementioned in this paragraph may be referred to hereinafter from time to time as "surface owners."

Defendant/Plaintiff-in-the-Interpleader, LL & E, is a Maryland corporation with its principal place of business in Texas.[6] Pursuant to 28 U.S.C. § 1335 and *via* counterclaim, cross-claim, and/or third party demand, LL & E filed an interpleader premised on minimal diversity required for statutory interpleader. The sum of $294,170.45 is presently on deposit in the registry[7] of the Court and the amount in controversy exceeds $75,000.00. Neither jurisdiction nor venue are contested.[8] The issues of liability and quantum were bifurcated and the issue of

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[5] *Id.* at Section I, EDC SFOF Nos. 1 through 5, and at Section II, St. Martin SFOF Nos. 1C through 1G [Addendum A].

[6] Stipulations, at Section I, EDC SFOF No. 6, and at Section II, St. Martin SFOF No. 1B [Addendum A].

[7] LL & E was the operator of all interests in the Units (i.e., LL & E Cenac Well No. 1/Unit Well for 88 RA SUA Unit and Burlington Resources Phillips No. 1/Unit Well for 88 RB SUA Unit created by Conservation Order No. 276 V) for the production of unitized oil, gas, and other hydrocarbons. See, St. Martin SFOF Nos. 25, 26, and 27. As operator, LL & E produced and sold oil, gas and other hydrocarbons from the Units. See, St. Martin SFOF No. 28. The funds on deposit in the registry of the Court have accrued because of the production of unitized oil, gas, and other hydrocarbons and the disposition of same by LL & E. See, St. Martin SFOF No. 29 [Addendum A].

[8] Both consolidated suits are premised on complete diversity of citizenship between EDC and the defendants.

liability was the subject of a three-day bench trial which commenced on Monday, May 15, 2000.

II. CONTENTIONS OF THE PARTIES

There are four tracts of land which are the subjects of these consolidated proceedings, to wit: (1) the 170 acre tract that is the subject of CA 98-3395 involving EDC and the St. Martin Group; (2) the 1000 +/- acre tract which is the subject of docket No. 99-1793 involving EDC and the St. Martin Group; and (3) the two small unit tracts in the 88 Reservoir A, Sand Unit A, and 88 Reservoir B Sand Unit A, the surface of said unit tracts being owned by the Staggs and the Fisters. Although the ultimate issue before the Court is the mineral ownership of those four tracts,[9] counsel for EDC correctly notes those tracts figure only marginally in the two principal debates between it and the surface owners in these consolidated proceedings.

The immediate issues focus rather on the mineral ownership of a tract of land lying to the south of those four tracts referred to throughout this opinion and the testimony of expert witnesses as the red-outlined "Protective Area."[10] For ease of reference the Court will refer to EDC's Map No. 10 [EDC Exhibit 216] throughout this Memorandum

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[9] Southdown Lands, Southdown Inc. and Realty Operators are all predecessors in title to the St. Martin Group, the Staggs, the Fisters and the Foundation by virtue of the following chain of title: EDC Exhibits 73, 64, 141, 141A, 141B, 50, 138/48, 38, 243, 242, 241, 194/147, 193, 192/146, 191, 47, 46, 45, 34, 197, 196, 240, 238, 238A, 237, 236, 235, 134/27, 133/29, 131/22, 129/8, 127/5, 124/1, 125/2, 3, 212, 122, 123, 213, and 121. See, EDC SFOF No. 18.

[10] See, EDC Map No. 10 [EDC Exhibit 216].

Opinion, since it best graphically illustrates the relative locations of the various tracts at issue. As previously mentioned, the tract lying to the south of the surface owner's tracts will be herein after referred to as the red-outlined "Protective Area."[11] If the "Protective Area" is found to be only a portion of a single large contiguous mineral servitude conveyed by Southdown Lands to EDC's predecessor, Pelto Oil Company, by a mineral conveyance dated May 3, 1971 [EDC Exhibit 26], as EDC maintains, the defendant surface owners have conceded that "operations on the southern portion of such servitude would be sufficient to maintain the entire servitude."[12]

EDC claims title to the minerals and the ownership thereof beneath the property at issue devolved upon it allegedly *via* a mineral conveyance dated May 3, 1971 and effective January 1, 1971.[13] EDC's position is that pursuant to Southdown Lands' May 3, 1971 mineral conveyance

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[11] The relative location of "Protective Area" to the four tracts at issue in this case is depicted in Map 10 [EDC No. 216]. It shows that all four tracts lie to the northeast of the northern most portion of the red-outlined "Protective Area," which "Protective Area" was created by the August 31, 1966 Agreement between Southdown Inc. and Southdown Exploration Company. [EDC Exhibit 13].

[12] See, Pretrial Order, Uncontested Fact No. 38.

[13] See, MINERAL CONVEYANCE BY SOUTHDOWN LANDS, INC. TO PELTO OIL COMPANY, dated May 3, 1971, effective January 1, 1971 with attachments (EDC Exhibit 26) [attached as Addendum No. D]. Exhibit "A" to the May 3, 1971 Southdown Lands Mineral Conveyance to Pelto specifically incorporates by reference at item 22 the document and description of lands described in the instrument recorded in Terrebonne Parish, at COB 496, Entry No. 383344, which in turn refers to and incorporates by reference, the lands described in the 1944 Realty Operators' mortgage, also recorded in Terrebonne Parish at MOB 90, Page 342, Entry No. 56703.

to EDC's predecessor, Pelto Oil Company, it acquired a single large contiguous mineral servitude covering, *inter alia*, the 170 acre tract at issue in Civil Action number 98-3395 and the 1,000 acre tract at issue in Civil Action number 99-1793, as well as other contiguous acreage including the Staggs' and Fisters' unit tracts.

Counsel for EDC points out that both EDC and the defendant surface owners claims stem from a common ancestor in title, Southdown, Inc. which owned both the mineral rights and the surface of the tracts at issue in this case.

Defendants, the St. Martin Group, claim full ownership (i.e., ownership of the land and interest in the minerals beneath the same 170 acre, 1000 acre, and two unit tracts by virtue of their ownership of an undivided interest in and to the fee title to the aforesaid tracts and the alleged lapse of any servitude claimed by EDC due to ten year prescription for non-use.) The St. Martin Group's claims of ownership of the lands which are the subject of these consolidated proceedings are based upon the following enumerated instruments: (1) Contran Realty Corp. to Michael St. Martin dated 6/23/92 recorded under Entry No. 900447 as corrected by instrument 9/4/92 under Entry No. 903752. [EDC Exhibit No. 73]; (2) Ag-Lands Investment Co. to Michael St. Martin *et ux* dated 6/11/84 recorded Entry No. 739234 (EDC Exhibit Nos. 146/194); and (3) Ag-Lands Investment Co. to Michael St. Martin et ux dated 10/24/84 recorded under Entry No. 744732 (EDC Exhibit Nos. 147/194).[14] The Fisters claim of ownership to

[14] See, Pretrial Order, Section 7 Uncontested Facts, No. 1A-1C.

that portion of their lands is based upon either or both: (1) Ag-Lands Invest Co. to James Gary Fister, et ux dated 2/10/84 recorded under Entry No. 725824 (EDC Exhibit No 238); and (2) Ag-Lands Investment Co. to James Gary Fister, et ux dated 6/6/84 recorded under Entry No. 734278 (EDC Exhibit No. 240).[15] The Staggs claim of ownership is based upon both: (1) Ag-Lands Investment Co. to Samuel J. Stagg, III, et ux dated 9/10/87 recorded under Entry No. 810398 (EDC Exhibit No. 242); and (2) Ag-Lands Investment Co. to Samuel J. Stagg, III, et ux dated 2/12/88 recorded under Entry No. 820404 (EDC No. 243).

The defendants urge the Court to find as a matter of fact that they are owners of the properties which are the subject of the consolidated captioned matters and that mineral rights relating to such property have been extinguished or terminated by prescription resulting from nonuse for ten years.

More specifically, the defendants contend that any mineral rights EDC claims in the subject property could only be based on the May 3, 1971 Mineral Conveyance by Southdown Lands, Inc. to EDC's predecessor Pelto Oil Company, recorded in COB 515, Folio 73, Entry No. 402359 of the records of Terrebonne Parish (EDC Exhibit No. 26). Counsel for the defendant surface owners contends that May 3, 1971 instrument contains only a vague and ambiguous omnibus property description which is insufficient as a matter of law to give notice to the defendants, who are third parties to the May 3, 1971 Servitude Agreement. Defense counsel argues that the May 3, 1971

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[15] *Id.*, at No. 2A-2B.

Mineral Servitude does not describe St. Martin Contiguous Property or property owned by the Foundation, the Staggs or the Fisters.

Alternatively, and in the event that the Court finds the record documents sufficiently describe the one large contiguous servitude claimed by EDC, defense counsel argues the obligation which is subject to a suspensive condition described in the August 31, 1966 Agreement [EDC Exhibit 13] which refers to some twenty (20) listed sands within the wrap-around red-outlined "Protective Area" which tract lies to the south of their tracts, constitutes an attempt to extend the prescriptive period, and thus, somehow removed the "Protective Area" in its entirety from commerce making any part of it insusceptible of conveyance to Pelto Oil Company, EDC's predecessor in title. Also, as the argument goes, the St. Martin Group apparently contends that the August 31, 1966 instrument somehow created a mineral servitude with respect to the red-outlined Protective Area, such that there were no mineral rights left within the red-outlined "Protective Area" susceptible of conveyance later by Southdown Lands, Inc. *via* the May 3, 1971 mineral conveyance, since such rights were specifically excepted from the transfer.

The St. Martins' argument is that if the red-outlined "Protective Area" in its entirety is excepted or excluded from the one large contiguous servitude claimed by EDC, such would make such a servitude several noncontiguous tracts. Stated another way, with the red-outlined "Protective Area" completely carved out of the May 3, 1971 servitude, it does not create one large contiguous servitude but rather affects noncontiguous tracts, and thus, operations on any one tract would not interrupt prescription as to any other noncontiguous tract.

EDC counters the surface owners' contentions regarding excluding the red-outlined "Protective Area," with the clear wording of the August 31, 1966 agreement itself. Plaintiff's counsel argues that the August 31, 1966 agreement, within the boundary established by the red-outline (i.e., the "Protective Area"), at best, burdens only certain listed sands/horizons, and then only, with a conditional future obligation and not a servitude upon the entirety of the "Protective Area." EDC's position is precisely that August 31, 1966 Agreement by its terms: (1) neither presently effected any conveyance of mineral rights nor a mineral servitude with respect to the entirety of the property bounded by red-outline [i.e., the wrap-around "Protective Area"]; and (2) it patently addressed only certain listed sands and *not* all horizon's within the confines of the red-outlined "Protective Area."

Suffice it [sic] say, EDC's position is that even if only one horizon or sand within the red-outlined "Protective Area" was not conveyed prior to the execution of the May 3, 1971 servitude, then the red-outlined "Protective Area" was conveyed to EDC's predecessor, Pelto Oil, making such conveyance but one servitude, on one large contiguous tract, as the May 3, 1971 instrument plainly suggests.

The issues outlined above turn on the proper interpretation of the instruments, various clauses and property descriptions, as well as plats and surveys, registered in the conveyance records of Terrebonne Parish. Their interpretation, the law with respect thereto, and the effect as to third parties constitute the meat of the questions involved in this case.

It is appropriate to note here, again, that it was stipulated in the pre-trial order that in the event the

Court finds that one large contiguous servitude was sufficiently documented in the Terrebonne Parish records prior to the conveyances of the subject four tracts to the respective defendant surface owners in these consolidated cases, then plaintiff EDC's petroleum operations on the southern portion of such single large contiguous servitude are sufficient to maintain the entire servitude.[16]

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW[17]

The Court will not reiterate the parties' stipulations entered at the time of trial. Instead, and as previously mentioned, the Court attaches to its Memorandum Opinion a copy of the respective parties Stipulations as Addendum A. The Court's opinion, as is explained in great detail herein below, is that the August 31, 1966 agreement [EDC Exhibit 13] created no present mineral rights which burdened the entirety of the red-outlined "Protective Area" and thus, a single large contiguous mineral servitude remained in tact [sic] as such thereafter and following the May 3, 1971 Mineral Conveyance to EDC's predecessor in title, Pelto Oil Company. In other words, there still existed

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[16] See, Pretrial Order, at Section VII entitled Uncontested Facts, No. 38, at p. 21, wherein it is stated that: "If EDC has established ownership of one large contiguous servitude, which is denied by the St. Martins, Quality, the Foundation, the Staggs and the Fisters, defendants concede that operations on the southern portion of such a servitude would be sufficient to maintain the entire servitude."

[17] To the extent that any of the Court's findings of fact constitute conclusions of law, they are so adopted. And also, to the extent that any of the Court's conclusions of law constitute findings of fact they are so adopted.

mineral rights capable of alienation in the "Protective Area" at the time of the May 31, 1971 mineral conveyance [EDC Exhibit 26] to EDC's predecessor. Additionally, the May 3, 1971 conveyance sufficiently described the affected areas so as to put the St. Martin Group on notice, in that it specifically described by incorporating by reference an adequate description of the contiguous tracts covered by the May 3, 1971 Mineral Servitude. It was not and cannot be seriously disputed that the May 3, 1971 mineral conveyance specifically referred to and incorporated the conveyances and property descriptions contained in such other conveyances/instruments of record in Terrebonne Parish,[18] which as part of public record were available to third parties. All of the Court's findings are discussed in detail herein below.

A. The August 31, 1966 Agreement

By instrument dated August 31, 1966, recorded COB 433, Folio 128 of the records of Terrebonne Parish,[19] Southdown, Inc. conveyed to Southdown Exploration, Inc. all of its rights title and interest in and to the oil, gas and other minerals located in, on or under the lands outlined on plats outlined in blue on the plats marked Exhibits "A"

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[18] The May 3, 1971 Mineral Conveyance refers to and incorporates by reference, the Sale of Property by Southdown, Inc. to Southdown Lands, Inc., dated June 17, 1970 recorded in the Terrebonne Parish Records at COB 496, Page 305, Entry No. 383344 (EDC Exhibit 22/St. Martin Exhibit 11), which in turn refers to and incorporates by reference, the 1944 mortgage by Realty Operators, Inc., Southdown's ancestor in title, recorded in MOB 90, Page 342, Entry No. 56703 (EDC Exhibit 96/St. Martin Exhibit 5).

[19] EDC Exhibit 13.

through "H" and attached to the 1966 Agreement. These plats marked as Exhibits "A" through "H" to the 1966 agreement covered (8) separate, non-contiguous areas located in four different parishes. As previously mentioned "on each of the plats attached to the August 31, 1966 are *blue outline(s)* reflecting the boundaries of that particular Productive Area(s) within which Southdown, Inc. was conveying a mineral servitude to Southdown Exploration, Inc. The relevant plat to this litigation is the plat attached to the 1966 agreement as Exhibit 'D'."[20] Exhibit "D", the plat which is a copy of a Tobin map, is labeled "Lake Hatch Field Sunrise Field Terrebonne Parish, LA."

In this same August 31, 1966 instrument, Southdown Inc. obligated itself, subject to the condition described below, to make *future* conveyances to Southdown Exploration of the minerals in certain specifically identified sands, called *Known Productive Sands,* located in lands *surrounding* the Productive Areas. These lands surrounding the identified "Productive Area" were identified as the red-outlined "Protective Area", and all such lands within the Lake Hatch Field Sunrise Field area were illustrated by the Tobin Map attached as Exhibit "D" to the 1966 agreement [EDC Exhibit 13]. This obligation to make future conveyances of any of the listed Known Productive Sands in the Protective Areas was *conditioned* on any such named sand being found at some future date to be *capable of production in the Protective Areas.*[21]

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[20] Stipulations, at Section I, EDC's SFOF No. 9 [Addendum A]; and the August 31, 1966 Agreement.

[21] See, EDC's SFOF Nos. 10 and 11 [Addendum A].

Essentially, the Mineral Conveyance dated August 31, 1966 [EDC Exhibit 13] conveyed to Southdown Exploration, Inc., all of Southdown, Inc.'s

> right, title, and interest in and to the oil, gas and other minerals located in, or under the lands outlined in blue on the plats marked Exhibits "A" through "H", which said Exhibits are attached hereto and made part hereof in full by reference, covering lands located in St. James, Terrebonne, Ascension and Lafourche Parishes, Louisiana. The lands outlined in blue on Exhibits "A" through "H" are herein sometimes referred to as the "Productive Area." [EDC Exhibit 13].

It is quite apparent from the plats attached to the 1966 Mineral Conveyance that the blue-outlined area on each is the "Productive Area" and that the red-outlined area on each is the "Protective Area." The precise language of the act leaves no room to doubt and confirms beyond cavil: (1) the identity of each area outlined in blue on the plats as the "Productive Area," and (2) the identity of each area outlined in red on the plats as the "Protective Area."[22]

As previously mentioned, although several maps or plats were attached to the August 31, 1966 agreement, the

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[22] The 1966 Mineral Conveyance reads in pertinent part at numbered page 2:

> On the plats annexed hereto as Exhibits "A" through "G", there is outlined in red an additionally area adjacent to each of the Productive Areas shown on the plats. The lands lying between the limits of the Productive Area as outlined blue and the red outline in each instance are hereinafter referred to as the "Protective Area." See, 1966 Mineral Conveyance, at numbered p. 2 [EDC Exhibit 13].

one identified as Exhibit "D" and labeled "Lake Hatch Field Sunrise Field Terrebonne Parish, La.", is the plat which is relevant to the issues in dispute between the EDC and the defendant surface owners in these consolidated proceedings.

The "Lake Hatch Field Sunrise Field Terrebonne Parish, LA." plat, Exhibit "D" to the 1966 agreement, is a copy of a Tobin map. Certain geographic areas are delineated with red and blue lines, which lines are not described by reference to any measure, bearing, or direction. With respect to the red and blue-outlined Protective and Productive Areas, the parties agreed to cause accurate surveys of these areas and to later substitute detailed survey plats of these red-outlined and blue-outlined areas, respectively, the "Protective" and the "Productive" areas.

Regarding the August 31, 1966 act, it is not disputed that: (1) the parties to the 1966 act expressly agreed to cause an accurate survey of each of the areas outlined in blue (i.e., the "Productive Area"), and to substitute such detailed surveys for the plats attached to the 1966 act and identified as Exhibits "A" through "H";[23] (2) to substitute detailed survey plats of all the areas outlined in red, (i.e., the "Protective Area"); and not withstanding that, (3) no such surveys of the blue-outlined "Productive Area" or the red-outlined "Protective Area" were ever recorded in Terrebonne Parish's public records. This is of no moment, however, because of the stipulated fact that "[n]either the

[23] The agreement included that if any area outlined in blue did not include all units or acreage assigned to producing wells within the Productive Area at the time of the 1966 act, the act would be corrected retroactively to include such additional acreage.

tracts which are the subjects of these two consolidated suits for declaratory judgment, nor the unit tracts which are the subject of LL & E's consolidated interpleader suit are in either the Productive or Protective Areas described in Exhibit "M" to the August 31, 1966 agreement."[24]

This is not a boundary dispute regarding the red-outlined Protective Area, and the defendant surface owners' tracts are uncontrovertedly outside of the red-outlined Protective Area. The defendant surface owners' reference to the August 31, 1966 agreement is for the purpose of illustrating that the red-outlined "Protective Area" was somehow removed from commerce and thus, excluded or excepted from the May 31, 1971 conveyance to Pelto, EDC's predecessor.

The evidence and the August 31, 1966 instrument itself, supports no such assumption or conclusion. The only legal significance which can arguably be ascribed to the red-outlined "Protective Area" described by the August 31, 1966 agreement and depicted on the attached Lake Hatch Field Sunrise Field Map [EDC Exhibit 13 attachment "D"] is that such red-outlines depict the outer limits or geographical boundaries of the conditional future obligation with respect to the twenty (20) listed sands.[25]

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[24] See, Stipulations, Section I, EDC's SFOF No. 14 [Addendum A].

[25] The Court rejects St. Martin Group's contention that the red and blue outlines somehow form or set out some legal barrier making the conveyance of a single large servitude on May 3, 1971, an impossibility. See, Transcript, Vol. IV, pp. 368 and 370. Mr. Camp was asked by the St. Martin Group's counsel to assume that the red-outline of the "Protective Area" constituted some sort of "legal barrier," either entirely or as to some 20 sands listed. Mr. Camp testified summarily, that the

(Continued on following page)

The August 31, 1966 agreement identified twenty (20) "Known Productive Sands" located within the "Protective Area." These sands were listed on Exhibit "I" attached to the 1966 agreement. The specific language in the August 31, 1966 act dealing with the conditional obligation regarding the aforesaid twenty listed "Known Productive Sands" in the red-outlined Protective Area, reads as follows:

> As an essential and integral part of the consideration paid for this conveyance, *Grantor binds and obligates itself to convey to the Grantee, from time to time* as required, all of its right, title and *interest in and to the oil, gas, and other minerals in each Known Productive Sand when and if such sand is established to be productive or capable of production in the Protective Area. . . . If and when any Known Productive Sand is established to be productive or capable of production within the Protective Area as above provided, Grantor shall then be obligated to convey to Grantee the mineral rights in such Known Productive Sand as to the entirety of that Protective Area. . . . Each obligation to make such additional mineral conveyances as to Known Productive Sands shall arise immediately and automatically whenever any Known Productive Sand is established to be productive and capable of production in any portion of the Protective Area as provided above. . . . As heretofore provided, conveyances shall be made from*

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tracts at issue in this case were noncontiguous to each other – that was, however, assuming the red and blue lines are some sort of legal barrier lines that break up the property. *Id.* The Court rejects Mr. Camp's opinion in this regard, because there is no basis in fact or in the law for making any such assumption.

> *time to time whenever the conditions set forth above shall occur,* and the execution of the conveyance of mineral rights in an area or as to one Known Productive Sand shall not relieve Grantor of the obligation to make additional conveyances in the same area as to additional Known Productive Sands if the conditions set forth above requiring such additional conveyances in the same area or as to additional Known Productive Sands if the conditions set forth above requiring such additional conveyances thereafter occur. *Each conveyance shall be effective as of the date that a Known Productive Sand, or Known Productive Sands, is established to be productive or capable of production in the Protective Area. Each obligation of the Grantor to make an additional assignment shall be subject to enforcement through specific performance by the Grantee.*

See, August 31, 1966 Agreement, at numbered pages 2-4 [EDC Exhibit 13] (emphasis supplied). "There is no obligation in the August 31, 1966 agreement with respect to the Lake Hatch Field-Sunrise Field, conditional or otherwise, to make future conveyances of minerals in the subject Protective Area in any sands or depths other than the twenty listed sands."[26] Also, and as previously mentioned, it is not disputed that the tracts which are the subject of these consolidated proceedings, including the unit tracts which are the subject of LL & E's interpleader suit are not within either the red-outlined Protective Area or the blue-outlined Productive Area discussed above.

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[26] See, Stipulations, Section I, EDC's SFOF No. 13 [Addendum "A"].

With respect to the Lake Hatch Field Sunrise Field area, there appears no obligation in the August 31, 1966 agreement, conditional or otherwise, to create one large mineral servitude bound by the red-outlined "Protective Area." The 1966 agreement specifically refers to the twenty (20) listed Known Productive Sands or horizons within the "Protective Area." It clearly sets forth the conditional future obligation[27] to transfer "all of [grantor's] right, title, and interest in and to the oil, gas and other minerals in each Known Productive Sand." *Id.* (emphasis supplied).

The August 31, 1966 agreement further provides that:

> Grantor further agrees that during the existence of this obligation, any alienation, mortgage or encumbrance granted by Grantor and affecting the Protective Areas lying between the blue lines and the red lines on Exhibits "A" through "G" will specifically stipulate that the Vendee, mortgagee or grantee thereunder shall accept the same, subject to the terms and conditions of this agreement, and shall commit itself to the performance of Grantor's obligations hereunder as to the lands affected by such alienation, mortgage or encumbrance, unless Grantor, in such Act reserves all mineral rights to such lands. *Id.*, at numbered page 4.

The Court finds such a subsequent conveyance of the Protective Area in the Lake Hatch/Field-Sunrise Field,

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[27] "A conditional obligation is one dependent on an uncertain event. If the obligation may not be enforced until a certain event occurs, the condition is suspensive." La. Civ. Code art. 1767.

whereby Southdown Lands, Inc. acquired fee title to the subject property from Southdown, Inc. See, Conveyance from Southdown, Inc. to Southdown Lands, Inc. dated June 17, 1970 [EDC Exhibit 22/St. Martin Exhibit 11]. Thereafter as discussed in detail below, by virtue of a mineral conveyance dated May 3, 1971, effective January 1, 1971, recorded under Entry No. 402359 of the records of Terrebonne Parish, Pelto Oil Company [EDC's predecessor] was granted a mineral servitude by Southdown Lands, which included the 170 acre tract, the 1000 acre tract and the two unit tracts at issue in these consolidated proceedings.

B. The May 3, 1971 Mineral Conveyance Agreement

As previously mentioned, on June 17, 1970, Southdown, Inc. conveyed to Southdown Lands, Inc., fee title to all properties listed on an attached Exhibit "A", which describes the properties conveyed, **incorporating by reference previously *recorded documents***,[28] which specifically describe the property. In other words, the land referred to in June 17, 1970 conveyance to Southdown Lands, Inc. is described in the act as "the lands listed on the Exhibit attached hereto as Exhibit 'A'. . . ."[29]

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[28] See, June 17, 1970 Conveyance from Southdown, Inc. to Southdown Lands, Inc. [EDC Exhibit 22].

[29] *Id.*; *see also*, Stipulations, Section I, EDC SFOF No. 17 [Addendum A], which states: "The property being conveyed in the June 17, 1970 conveyance was described in Exhibit 'A' attached thereto by reference to previously recorded documents. Exhibit 'A' to EDC Exhibit 22 reflects that there is only one Terrebonne Parish entry, a mortgage

(Continued on following page)

A review of Exhibit "A" to the June 17, 1970 conveyance to Southdown Lands, Inc. reveals the Terrebonne Parish recordation of a 1944 mortgage by a prior owner in the chain, Realty Operators, Inc., in favor of Jefferson Standard Life Insurance Company, recorded under MOB 90, Entry No. 56703.[30] The 1944 mortgage and the description of lands set forth therein were specifically incorporated by reference. Exhibit "A" to the June 17, 1970 Conveyance states in pertinent part: "reference to which documents as so recorded being made for all legal purposes to the same effect **as though the said documents and a description of lands therein described were copied herein in extenso....**"[31] The June 17, 1970 Conveyance to Southdown Lands, Inc. along with its Exhibit "A" was recorded at entry number 383344 of the records of the Terrebonne Parish Clerk of Court on June 24, 1970.

It was stipulated that "Southdown Lands, Southdown Inc., and Realty Operators are all predecessors in title to the St. Martin Group, the Staggs, the Fisters and the Foundation by virtue of the following chain of title: EDC Exhibits 73, 64, 141, 141A, 141B, 50, 138/48, 38, 243, 242, 241, 194/147, 193, 192/146, 191, 47, 46, 45, 34, 197, 196, 240, 238, 238A, 237, 236, 235, 134/27, 133/29, 131/22, 129/8, 127/5, 124/1, 125/2, 3, 212, 122, 123, 213, and 121."[32]

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by a prior owner in the chain, Realty Operators, Inc., in favor of Jefferson Standard Life Insurance Company, recorded under MOB 90, Entry No. 56703. (EDC Exhibit 96)."

[30] See, June 17, 1970 Conveyance, at Exhibit "A", para. A(2).

[31] *Id.*, at para. A (emphasis supplied).

[32] Stipulations, at Section I, EDC SFOF No. 18 [Addendum A].

Following Southdown, Inc.'s June 17, 1970 sale of its fee title interest to all of its land, including the lands located in all "Productive Areas" and "Protective Areas" to Southdown Lands Inc., Southdown Lands Inc. conveyed to Pelto Oil Company [EDC's predecessor in title],[33] a mineral servitude covering all of its interest in all oil, gas and minerals in the lands then owned by it, including those lands located in the "Protective Area" of the Lake Hatch/Sunrise Field, by deed dated May 3, 1971 [EDC Exhibit 26].

By its terms the May 3, 1971 instrument conveys to Pelto (EDC's predecessor) "all of grantor's right, title and interest to all oil, gas and other minerals" located in the various tracts described by the attached Exhibit "A", with the exception of rights that had been previously conveyed. The May 3, 1971 Mineral Conveyance set forth the following specific exception, to wit:

> "1). There is excepted from the Conveyance here made all mineral rights, royalties and leasehold interests heretofore conveyed or transferred by Vendor or its predecessors in title to third parties or terminated by prescription." [EDC Exhibit 26].

As previously discussed above in Section A of the [sic] this Memorandum Opinion, the obligation prescribed by the August 31, 1966 agreement, was merely a conditional future obligation regarding the Protective Area, which was, in any event, limited to specific sands or "horizons" in

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[33] In 1989, by merger, EDC became the successor of Pelto Oil Company (i.e., the Grantee in the May 3, 1971 agreement.) See, Merger of Pelto and EDC [EDC Exhibit 68/St. Martin Exhibit 20].

the Protective Area, such that **there remained mineral rights in the Protective Area** capable of being conveyed *via* the May 31, 1971 Conveyance to Pelto Oil Company, EDC's predecessor.

Also as previously mentioned, Exhibit "A" to the May 3, 1971 agreement contained no property description *per se,* but it did incorporate by reference the June 17, 1970 Conveyance, an act recorded act [sic] in Terrebonne Parish, to wit:

> "1). That certain sale of property from Southdown Inc., to Southdown Lands, Inc., passed before Luther E. Hall, Jr., Notary Public in and for Orleans Parish, Louisiana under the date of June 17, 1970, and recorded as follows. . . . " [EDC Exhibit 22].

This is followed by recordation references including the act recorded in Terrebonne Parish, at COB 496, entry no. 383344 (i.e., the June 17, 1970 Conveyance referred to herein above). Also, and as previously mentioned, the June 17, 1970 Conveyance [EDC Exhibit 22] describes the lands as the [sic] "the lands listed on the Exhibit attached as Exhibit "A", which in turn incorporates by reference the description of lands set forth in Realty Operators' September 8, 1944 mortgage, recorded in Terrebonne Parish at MOB 90, entry number 56703. [EDC Exhibit 96].

Turning to the relevant September 8, 1944 Act of Mortgage [EDC Exhibit 96/St. Martin Exhibit 5], entry number 56703, MOB 90, recorded in the records of the Terrebonne Parish Clerk of Court on September 9, 1944, it is a "metes and bounds" description of the single large contiguous mineral servitude (i.e., the May 3, 1971 Mineral Conveyance), at issue in this case.

C. Discussion of Evidence Presented and the Applicable Law

The obligation in the August 31, 1966 agreement is clearly with respect to: (1) mineral **rights** in connection with certain listed sands only, which sands are located in the Protective Area; (2) the conveyance of such rights **in the future**; and (3) conditioned upon the occurrence of an event that may or may not ever occur. [EDC Exhibit 13]. In determining the intention of the parties to a contract, the clear wording of the contract which speaks to "the common intent of the parties"[34] cannot be ignored.

Civil Code Article 2053 provides the frame work [sic] for interpretation in the case where a contractual provision is perceived as doubtful and states:

> A doubtful provision must be interpreted in the light of the nature of the contract, equity, usages, **the conduct of the parties before and after the formation of the contract**, and of other contracts of a like nature between the same parties.

La. Civ. Code art. 2053. (emphasis supplied).

It is difficult if not impossible to reasonably conclude, as the St. Martin Group urges, that the subject Protective Area was somehow excluded from the later May 3, 1971 conveyance by its specific exclusionary language. If that were the case, the facts before the Court would be that

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[34] La. Civ. Code art. 2045 provides:

> Interpretation of a contract is the determination of the common intent of the parties.

after May 3, 1971, Southdown Lands, Inc. and/or its successors, and not Pelto and its successor EDC, would have granted mineral leases covering the much-discussed Protective Area.

The facts before the Court regarding the conduct of the parties after the formation of the contract are indisputedly that no less than twenty-two (22) mineral leases covering portions of the Protective Area were executed by Pelto Oil Company, and/or its successor, EDC, subsequent to May 3, 1971.[35] There is no evidence to the effect that any mineral leases covering any portion of the Protective Area at issue were executed by Southdown Lands or its successors to the surface ownership of the Protective Area during the twenty-six (26) year period following the May 3, 1971 conveyance. That record remained unbroken until May of 1997, when the St. Martins granted a lease to LL & E.

The evidence before this Court further shows that five (5) wells were drilled within the subject Protective Area by lessees of Pelto Oil Company and/or EDC subsequent to May 3, 1971. [EDC Exhibits 152 *in globo* and 166].

Also, the Court cannot ignore the fact of the June 24, 1982 mineral assignment **by Pelto** to Aminoil **regarding**

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[35] Mr. Keith Hebert (Mr. Hebert), EDC's expert petroleum landman, testified after the May 31, 1971 conveyance that there were 22 oil and gas leases and one option executed by Pelto or EDC. The leases were identified as EDC Exhibits 28, 30, 35, 40-44, 49, 51, 62, 63, 65, 70, 80-84, 86, 87 and 91, EDC Exhibit 88 being the option. None of the leases excluded any of the twenty (20) listed sands that were the subject of the August 31, 1966 agreement. Transcript, Vol. IV, pp. 317-318.

"Known Productive Sand" labeled "D-12" on Exhibit "I" to the August 31, 1966 agreement. The June 24, 1982 Pelto/Aminoil assignment [EDC Exhibit 52] recognized that it was being made in conformance with the obligations imposed by the August 31, 1966 agreement. [EDC Exhibit 13]. The Pelto/Aminoil mineral assignment (EDC Exhibit 52) states that "Pelto . . . is the owner of the oil, gas and other minerals formerly owned by Southdown, Inc., under the instrument effective as of August 31, 1966" and that the mineral conveyance of a 60% mineral interest is being made "in conformance with the obligations imposed in said Conveyance." [EDC Exhibit 52].[36]

Simply stated, the defendants have identified no shortfall in the 1966 agreement which would negate the later conveyance of a single large contiguous mineral servitude, on May 3, 1971. Per the August 31, 1966 agreement, future conveyances in the Protective Area referred to were **with respect to *certain sands***[37] and are

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[36] Mr. Hebert, testified regarding Pelto's June 24, 1982 assignment to Aminoil of 60% in the D-12 sand which was identified in the August 31, 1966 agreement and that Valhi was the surface owner at the time of the June 24, 1982 assignment to Aminoil. Transcript, Vol. IV, pp. 318-319.

[37] La.Rev.Stat. 31:68 provides for the eventuality that a mineral servitude may be created with respect to certain sands or horizons and not others, to wit:

> A single mineral servitude is established on a continuous tract of land notwithstanding that certain horizons or levels are excluded or the right to share production varies as to different portions of the tract or different levels or horizons.

The Comment to Louisiana's Mineral Code at 31:68 explains:

> Article 68 is applicable even if the original conveyance includes rights to separate strata or defined depth levels as

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conditional future obligations. In this vein, the 1966 agreement does not refer to any servitude or to the Protective Area as a servitude, but rather uses the precise term mineral "rights," **to be** conveyed in the Protective Areas (i.e., conditional future rights). See, La. Civ. Code arts., 1767, 1775.

Counsel for EDC correctly points out that even if this Court were to assume that the August 31, 1966 affected some immediate or present right, such mineral right by the terms of the August 31, 1966 agreement itself affects only the twenty (20) listed sands or horizons. Louisiana's Mineral Code at La.Rev.Stat. 31:68 permits the creation of mineral servitudes with respect to certain sands or "horizons" and not others. Therefore, even assuming a mineral servitude as to certain sands, there is no basis for this Court to conclude that all depths, sands or "horizons" were conveyed by the August 31, 1966 agreement leaving nothing to convey to Pelto in the May 3, 1971 Mineral Conveyance. The Court agrees with EDC, that even one such horizon remaining unaffected by the 1966 agreement would make EDC's one large servitude contiguous.

Regarding the conditional future obligation with respect to the twenty listed sands within the "Protective Area", the Louisiana Civil Code pretermits any finding that such a conditional future obligation in the 1966

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long as the rights conveyed underlie a continuous body of land on which a single servitude is created.

Simply stated, certain sands, levels or horizons may be excepted from a single large contiguous servitude as long as there is a continuous body of land, at least one horizon, on which the servitude is created. See, *Gulf Oil Corp. v. Clement*, 118 So.2d 361 (1960).

agreement so burdened the "Protective Area" as to take it out of commerce. Louisiana Civil Code article 1775 states in no uncertain terms that:

> Fulfillment of a condition has effects that are retroactive to the inception of the obligation. Nevertheless, that fulfillment does not impair the validity of acts of administration duly performed by a party, nor affect the ownership of fruits produced while the condition was pending. **Likewise, the fulfillment of the condition does not impair the right acquired by third persons while the condition was pending.**

La. Civ. Code art. 1775 (emphasis added). Comment (b) to Article 1775 goes [sic] explains that "[w]here immovable property is concerned, any conflict must be resolved in light of the public records doctrine." *Id.* at Comment (b).

No doubt, at the time of the defendant surface owner's acquisitions (EDC Exhibits 73, 196, 197, 238, 240, 242, and 243) of the respective tracts at issue in these consolidated proceedings, under the public records doctrine each had a right to determine whether each such tract acquired was burdened with a servitude created by the May 3, 1971 conveyance. Exhibit "A" to the May 3, 1971 conveyance effectively communicates notice to third parties and permits finding that each such tract acquired was burdened by a single large contiguous servitude. The May 3, 1971 Mineral Servitude incorporated by reference other recorded instruments (i.e., the June 17, 1970 Conveyance

[EDC Exhibit 22], which in turn incorporated the 1944 mortgage [EDC Exhibit 96]).[38]

It is the description in Realty Operators' 1944 recorded mortgage upon which EDC bases its mineral servitude on the tracts at issue in this case, including the "Protective Area," and the contiguous acreage described therein. Realty Operator's 1944 Mortgage described the tracts at issue and contiguous lands by section, township, plantation name [i.e., Waterproof], and by frontage on the bayou and by adjacent lands.

With respect to the EDC's single large contiguous servitude, Mr. Ralph Gipson ("Mr. Gipson"), EDC's expert surveyor, painstakingly went through the exercise of walking this Court line by line, mete by mete, bound by bound, around the entirety of EDC's single large contiguous servitude. He read aloud each affected tract from the 1944 mortgage and illustrated where each such tract was

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[38] Mr. Ralph Gipson, EDC's expert surveyor, testified as to the advantages of describing the property by incorporation by reference to previously recorded instruments, noting that there is nothing confusing about the methodology, one simply makes his way to the courthouse or has somebody else get the instrument for review. The advantage to description by reference to previously recorded instruments is that risk of typographical error from retyping a lengthy land descriptions [sic] is nil. (Transcript, Vol. II, p. 85, 11.18-25). It is not disputed that May 31, 1971 servitude agreement referred to and incorporated by reference one pertinent previously recorded document in the records of Terrebonne Parish (i.e., the June 17, 1970 conveyance from Southdown, Inc. to Southdown Lands, Inc. [EDC Exhibit 22], which in turn refers to and incorporates by reference Realty Operators 1944 Mortgage, MOB 90, entry 56703 [EDC Exhibit 96]). Realty Operators' 1944 mortgage does contain a metes and bounds description of the lands which are the subject of the May 3, 1971 Mineral Servitude

located utilizing EDC Map 6 [EDC Exhibit 162][39] for purposes of the exercise, highlighting in yellow to indicate contiguous acreage, and coloring in green each such tract. The 1944 mortgage unquestionably contains the description of EDC's single large contiguous mineral servitude. Mr. Gipson's coloring on Map 6, illustrated graphically for the Court the contiguity among the tracts described in the 1944 Mortgage.[40]

Article 63 of Louisiana's Mineral Code states that: "A single mineral servitude is created by an act that affects a continuous body of land although individual tracts or parcels within the whole are separately described." La.Rev.Stat. 31:63.

Now addressing the St. Martin Group's concerns with the adequacy of the property description set forth in the 1944 mortgage, issue was taken with respect to: (1) the northeastern boundary of EDC's servitude [i.e., that portion of Mandalay Plantation lying in the west 569 acres of Section 104, Township 17 South, Range 17 East;[41] and (2) that portion of the Waterproof Plantation lying to the west of the east 600 feet of Section 60, Township 17 South, Range 16 East, being that portion of the plantation that was not also identified by section, township and range in

[39] As indicated above EDC's Map 6 was used for illustrative purposes only. **This exercise could have been accomplished utilizing any map of the subject area which exhibited section, township and range lines.**

[40] Transcript, Vol. II, pp. 92-103.

[41] The St. Martin Group maintains that that particular boundary, the northeastern boundary of EDC's servitude could be drawn with various slants and still obtain approximately 569 acres.

the 1944 mortgage (i.e., the northwestern boundary of EDC's servitude).

Considering such protestations, the Court can hardly ignore the June 23, 1992 Contran sale to Michael St. Martin involving the approximate 1000 acre tract at issue (EDC Exhibit 73) in this case. Mr. Gipson pointed out that it contains a "metes and bounds" description of the entire tract being acquired by the St. Martins and, not unlike the 1944 mortgage, provides several references to the Mandalay Plantation at Exhibit "A" (i.e., the actual property description). (Transcript, Vol. II, p. 106).

In particular, Gipson noted the call, "north 61 degrees, 5 minutes east, a distance of 7,786 feet, plus or minus, **to a point on the eastern property line of *Mandalay Plantation***" and "a distance of 895 feet, plus or minus, to a point of intersection of **said property line**." (Transcript, Vol. II, p. 107, 11. 6-20/EDC Exhibit 73 at Exhibit "A"). The sum and substance of the aforesaid testimony is that prior to the time of the St. Martins' July 23, 1992 acquisition from Contran the eastern boundary of the Mandalay Plantation was discernible and had been located by Mr. Camp, defendants' expert surveyor. The St. Martin's deed of acquisition from Contran in 1992 made calls and references to that very same boundary.

Counsel for EDC aptly describes the St. Martins' attack of the eastern boundary of EDC's servitude, as tantamount to an attack on the eastern boundary of their own surface ownership. Referring both to recorded documents and extrinsic evidence, Mr. Gipson testified credibly

as to what inquiry would have revealed with respect to the eastern boundary of Mandalay Plantation and the western boundary of Waterproof.[42]

Gipson adopted a 1979 Charles Camp[43] survey. It is evident that Mr. Camp, defendant's expert, surveyed the same line in the context of a composite survey of Waterproof and Mandalay Plantations (EDC Exhibit 141A), which survey was recorded on January 31, 1986, more than six years prior to the St. Martins' acquisition from Contran which had the same eastern boundary on June 23, 1992. (Tr. Vol. II, pp. 103-104). The Camp survey (EDC 141A) was also recorded prior to the Foundation's acquisitions in December 1989 and 1991 (EDC Exhibits 196 and 197) and Staggs' acquisitions in September 1987 and February 1988 (EDC Exhibits 242 and 243).

The Court has been cited no authority for the proposition that EDC must establish the outermost limits of its servitude. More to the point, research reveals no authority

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[42] Referring to Exhibits EDC Exhibit 145 and 145A, Gipson discussed the Survey of the Louisiana and Texas Intracoastal Waterway, illustrating to the Court the intersection of that waterway with the eastern boundary of Mandalay Plantation (i.e., the eastern boundary of the west 569 acres of Section 104), which the St. Group maintains is not locatable. Transcript, Vol. II, pp. 122-124. Gipson also discussed the 1926 T. Baker Smith plat, recorded in 1931, locating the Waterproof and the Mandalay Plantations. See, Transcript, Vol. II, pp. 109-111; EDC Exhibits 144, 144A, and 144B. Gipson then, engaged in another mind-numbing exercise of tracing the St. Martins', the Fisters' and the Foundation's chain of title back to David Pipes, noting that the 1926 T. Baker Smith plat was referenced in a [sic] two mortgages by David Pipes, et al (EDC Exhibits 150 and 151). Transcript, Vol. II, pp. 111-122.

[43] Charles Camp was the St. Martin Group's expert surveyor, who testified on their behalf at trial.

which would require proof of "the outermost limits" of the mineral servitude at issue, that is, limits which have nothing to do with the defendant surface owners' servient estates or the mineral operations at issue in this case, limits which have nothing to do with servient tracts at issue in this case.

The evidence of record is clearly to the effect that the northwest boundary of EDC's servitude does not affect and is not anywhere near the four tracts at issue in these consolidated proceedings. In any event, Mr. Gipson testified credibly that the western boundary of Waterproof Plantation had been surveyed, by Mr. Camp himself,[44] and that the Camp survey was attached to a 1980 Boundary Agreement[45] between A.L. Daspit, et al, and J.G. Robbins, then owner of Waterproof Plantation. Mr. Camp testified that: (1) Waterproof Plantation was in the general area of Sections 59 and 60; (2) historically, the tree line located in Section 59 marked the western boundary of Waterproof Plantation (i.e., the boundary between Waterproof and Flora Plantations).[46] Camp's survey was recorded in April 1981, well before the defendant surface owners acquired their respective tracts.

The Court concludes that the description in the 1944 mortgage "locates the lands with sufficient certainty to be located by any one who is at all familiar with locating lands."[47] The documentary and testimonial evidence

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[44] Transcript, Vol. III, pp. 183-184.

[45] EDC Exhibit 115.

[46] Transcript, Vol. V, pp. 416-17, 419-20.

[47] *Robinson v. Atkins*, 30 So. 231 (1900).

demonstrate that both Mr. Gipson (EDC's expert surveyor), and Mr. Camp (the St. Martin Group's expert surveyor), had little difficulty locating the boundaries called in the 1944 mortgage.

Mr. Keith Hebert utilized the chart set forth at EDC's Exhibit 245,[48] to illustrate the respective parties common chain of title from 1971 and prior thereto, going back to 1897. The Court uses the term common chain of title to connote common as between EDC, the St. Martin Group, the Fisters, the Staggs, and the Foundation – that is, the surface and minerals were common from May 31, 1971 back in time. Transcript, Vol. IV, p. 324. Mr. Hebert pointed out that the February 26, 1931 David Pipes, et al mortgage to Prudential (EDC Exhibit 150) covered properties being described as the west 569 acres of Section 104 and other properties, which were referred to as the Mandalay Plantation. He also noted that the single page plat (EDC Exhibit 144) was referred to in the 1931 Pipes mortgage property description (EDC Exhibit 150). Mr. Hebert pointed out that the mortgagors' deed of acquisition contained the same property description as the one in the 1931 Pipes mortgage. He went on to explain that he

[48] On cross-examination, Mr. Hebert readily admitted his chart which constituted EDC Exhibit 245 contained no reference to either the August 31, 1966 agreement or the D-12 sand conveyance to Aminoil. Transcript, Vol. IV, pp. 345 and 347. Hebert explained on redirect that the chart that comprises EDC Exhibit 245 was constructed primarily to show surface ownership of the Waterproof and the Mandalay Plantations and for the purpose of showing the bounding owners of Flora Plantation, below and Bannan Bonvillain, above. Transcript, Vol. IV, p. 351. It did not show the 1944 mortgage or the August 31, 1966 agreement, as such was illustrated in the context of EDC Exhibit 165, which is entirely devoted to the Protective Area. *Id.*, at pp. 351-52.

found yet another Pipes, et al, mortgage (EDC Exhibit 151), which referenced the blue map by T. Baker Smith (EDC Exhibit 144). Within the body of this second Pipes, et al mortgage, just like the first, there is a description of Mandalay Plantation and other properties. David Pipes, et al, were the immediate predecessors in title to Realty Operators (EDC Exhibit 121), which executed the much-talked-about 1944 mortgage (EDC Exhibit 96/Addendum E). Also, David Pipes, et al, were predecessors in title to the St. Martin Group, the Foundation, the Fisters, and the Staggs. Transcript, Vol. IV, pp. 324-330.

Further, and insofar as notice is concerned, the Court cannot turn a blind eye to the fact that several conveyances to the St. Martin Group affecting 170 acre and the 1,000 acre tracts at issue, acknowledge the existence of the servitude, to wit: (1) the June 23, 1992 Contran Realty sale to Michael St. Martin (EDC Exhibit 73) acknowledges the existence of the mineral servitude wherein it states that the vendor and vendee acknowledge with the Exception of "B", more particularly described on Exhibit "B" and without intending to interrupt any prescriptive periods which may be presently accruing as to oil, gas, and other minerals lying in, on, or under the subject property, **have been previously conveyed**; (2) the June 11, 1984 AG-Lands Investment sale to Michael St. Martin (EDC Exhibit 192), which notes at page 2, paragraph 2, that "**[n]o minerals underlying the subject property are transferred herein, same having been severed by ancestors in title**;" and (3) the October 24, 1984 AG-Lands Investment sale to Michael St. Martin (EDC Exhibit 194), similarly states at page 2, paragraph 2, that "**[n]o minerals underlying the subject property are transferred herein, same having been severed by ancestors in**

title." Transcript, Vol. IV, pp. 336-338. The properties covered in the June 23, 1992 Contran Realty sale are the southern half of west 569 acres of Section 104, the properties covered in the June 11, 1984 AG-Lands sale are the center of the western 569 acres of Section 104, and in both Hebert's/Gipson's opinions, the two tracts covered in the October 24, 1984 AG-Lands sale lay within Section 104 are in the western half of the western 569 acres of Section 104, Township 17 South, Range 17 East. *Id.* at pp. 338-339, 349. Finally, Mr. Hebert pointed out that his search of the Terrebonne Parish Courthouse revealed an instrument titled "Act of Subordination Sale of Property, and Conveyance of Servitudes" (EDC Exhibit 48) involving Pelto Oil, Aminoil Development, Mr. Thomas Goldsby, Jr., James Robbins, and Valhi, Inc., predecessors in title to the St. Martin Group, the Staggs and the Fisters. Transcript, Vol. IV, pp. 339-341.

The description of property set forth in the 1944 mortgage does not merely describe the property by reference to the plantation names only. However, the Court here notes that Louisiana cases hold that the name of the plantation itself must be considered in identifying the property. In *Emerson v. Cotton*, 26 So.2d 16, 18 (La. 1946), the court stated:

> This Court has held in a number of cases that where a plantation or property known by a specific name was conveyed, the name itself must be considered in identifying the property. In fact, some of the decisions go so far as to state that the name itself is almost a sufficient description. *Levy v. Ward,* 33 La.Ann. 1033; *Dickson v. Dickson,* 36 La.Ann. 870; *Bryan v. Wisner,* 44 La.Ann. 832, 11 So. 290; *Robinson v. Atkins,* 105 La. 790,

30 So. 231; *Suthon v. Laws,* 127 La. 531, 53 So. 852.

Id.

In the case at bar, as illustrated at length in Gipson's exercise discussed herein above, the 1944 mortgage **locates the plantation by name *and parish, on the left descending bank of Bayou Black***, and ***gives the frontage and depth*** and ***identifies the adjoining landowners***. This description of lands in the recorded 1944 mortgage, which description was incorporated by reference into the May 3, 1971 Mineral Conveyance, was sufficient to convey immovables under applicable Louisiana law and to put the defendant surface owners on notice,[49] that the May 3, 1971 Mineral Servitude covered

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[49] In *White v. Ouachita Natural Gas Co., Inc.*, the Louisiana Supreme Court summarized the rule regarding the sufficiency of a description insofar as third parties and notice is concerned as follows:

> "It suffices if the description be such as to enable the court to determine with certainty, with the aid of such extrinsic evidence as is admissible under the rules of evidence, what property was intended by the parties to be covered thereby. The description need not be given with such particularity as to make resort to extrinsic evidence unnecessary." *Tircuit v. Burton-Swartz Cypress Co.*, 162 La. 319, 110 So. 489, 492.
>
> Therefore, whilst an unrecorded deed can have no effect whatever on third persons, the same is not true where the deed is recorded but contains only an inaccurate or faulty description of the property but not so inaccurate or faulty as to be actually misleading. Hence when the only description in a mortgage was "one large property or tract at the corner of Orleans and Bourbon Streets" without any other boundaries given, this was held sufficient to put a purchaser on his guard. *Roberts v. Bauer,* 35 La.Ann. 453, citing *City Bank v.*

(Continued on following page)

one large contiguous area which covered the four tracts at issue and the pertinent mineral operations which maintained the single large servitude.

The Court finds that EDC has met its burden of proof under Louisiana Civil Code article 730[50] and other pertinent Louisiana law. The applicable law is precisely to the effect that utilizing the public records, the property at issue (i.e., the contiguous servitude insofar as it covers the four tracts at issue and pertinent mineral operations) must be located and identified, to wit:

> **The description in a deed must be such that the property intended to be conveyed can be located and identified**, and the general rule is that the description must fully appear within the four corners of the instrument itself, **or that the deed should refer to some map, plat, or deed as a part of the description, so that the same may be clear**.

Daigle v. Calcasieu Nat'l Bank in Lake Charles, 9 So.2d 394, 397 (La. 1942) (emphasis supplied).

The Court simply disagrees with the St. Martin Groups' argument that they were entitled to ignore [sic] 1944 mortgage recorded in Terrebonne Parish, since it was

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Denham, 7 Rob. 39, and *Ells v. Sims*, 2 La.Ann. 253. See also, *Lee v. Long*, 166 La. 1084, 118 So. 320.

Id.

[50] "Doubt as to the existence, extent, or manner of exercise of a predial servitude shall be resolved in favor of the servient estate." La. Civ. Code art. 730.

not attached to the May 31, 1971 Conveyance, but was instead referred to and incorporated by reference.

Considering the stipulation of the parties set forth at item 38 of the pre-trial order,[51] operations on the southern portion of EDC's single contiguous servitude were sufficient to maintain the EDC's entire servitude. Notwithstanding the stipulation, counsel for EDC preferred not to rest on the stipulation only. That was because of the St. Martin Groups' argument that the property descriptions were inadequate with respect to the western boundary of Waterproof Plantation and the eastern boundary of Mandalay Plantation. EDC thus, went the step further and adduced evidence which sufficiently proved that EDC did not rely on any mineral operations in either of the contested areas for the maintenance of its single large contiguous servitude.

Mr. Hebert's uncontroverted testimony in that vein was that since 1971, the longest period of time between spud dates of wells drilled on the servitude, (less and except the Protective Area, the entirety of Section 104 T17S, R17E, and the part of Waterproof Plantation not identified by section, township and range), was 5 years and nine months – that is, well within the 10 year prescriptive period set forth in article 27 of the Mineral Code. (Transcript, Vol. IV, p. 306). Regarding productive wells none were located in Section 104 T17S R17E or had a bottom hole location anywhere within the Protective Area. (Transcript, Vol. IV, p. 312). Mr. Hebert further testified that eight (8) years was the longest span of time since

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[51] See, Note 16, *supra*.

1971 in which there was no production from any well drilled on the entire servitude.

IV. CONCLUSION

For the reasons cited hereinabove and considering the evidence and the applicable law, it is this Court's considered opinion that EDC's predecessor, Pelto Oil Company, acquired a single large contiguous mineral servitude that at least covered the four tracts at issue. It acquired such a servitude *via* Mineral Conveyance dated May 3 1971, effective January 1, 1971, recorded under Entry No. 402359 of the records of Terrebonne Parish, which contained an adequate property description in that it incorporated by reference other recorded instruments that sufficiently described the location and extent of the large single contiguous servitude at issue. Finally, the aforesaid mineral servitude has been maintained, such that EDC is the owner of sums that have been deposited in the registry of this Court by LL & E and is further entitled to all future payments of all royalty on future production which are attributable to it and its assigns, as Operator of the 88 RA SUA and 88 RB SUA units.

Accordingly,

IT IS ORDERED that the declaratory judgment action filed on behalf of the plaintiff Energy Development Corporation is GRANTED and judgment shall issue in favor of Energy Development Corporation and against the defendant surface owners herein, the St. Martin Group, the Foundation, the Staggs, and the Fisters, each party to bear their own costs.

IT IS FURTHER ORDERED that counsel for Energy Development Corporation shall forthwith submit the proposed form of judgment, consistent with the foregoing opinion of this Court.

New Orleans, Louisiana, this 12th day of December, 2000.

/s/ Charles Schwartz, Jr.
UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ENERGY DEVELOPMENT CORPORATION	CIVIL ACTION
	NO. 98-3395
versus	SECTION "A"
MICHAEL X. ST. MARTIN, ET AL.	

ORDER AND REASONS

(Filed Mar. 9, 1999)

Defendants move for dismissal of this action or, alternatively, for this Court to abstain from hearing the matter.

BACKGROUND

In 1992, defendants Michael and Virginia St. Martin bought land in Terrebone Parish, Louisiana.[1] Plaintiff Energy Development Corporation ["Energy"] alleges that it holds a mineral servitude on that land, granted in 1971 by the St. Martin's predecessor-in-interest to Energy's predecessor-in-interest. The dispute about the validity of Energy's servitude has spawned this action and two Louisiana state court actions involving separate tracts of land within the St. Martin's property. The instant action

[1] In 1994, the St. Martins conveyed a 10% interest in the land to Quality Environmental Processes, Inc. ("Quality"), but for simplicity herein the Court will refer to the St. Martins as the property owners.

involves one tract. The state court actions involve the others ["Tract 1" and "Tract 2"].

First State Action – Tract 1

Energy filed the first state action in July, 1997, seeking a judgment that its servitude was valid as to Tract 1. The state court granted summary judgment to the St. Martins, finding that the 1971 conveyance to Energy's predecessor-in-interest did not create a servitude because the property description was insufficient to give notice to third parties. That matter is on appeal.[2]

Second State Action – Tracts 1 and 2

The second state action is a concursus filed in September, 1998. The St. Martins, based on ownership, and Energy, based on its servitude, each granted mineral leases covering Tracts 1 and 2 to two different companies. Those companies produced gas, deposited royalties from the production into court, and filed the concursus naming the St. Martins and Energy as claimants to the fund.[3]

In answer to the concursus, the St. Martins advanced the *res judicata* effect of the judgment in their favor in the

[2] Though the same alleged servitude is at issue herein, the possible *res judicata* affect of that judgment has not been advanced in the instant motion.

[3] Energy removed the concursus action here as a diversity jurisdiction interpleader action under 28 U.S.C. § 1335, (CA #98-3080), but it was remanded to state court because 28 U.S.C. § 1441(b) forbids the removal of an action based on diversity of citizenship if a defendant is a citizen of the forum state. The St. Martins are citizens of Louisiana.

first state action, at least as to Tract 1. Also, as a reconventional demand, they alleged their ownership of ***all*** the land, encompassing Tract 1, Tract 2, the tract in this action, and more, and the invalidity of Energy's servitude as to ***all*** the land; or, alternatively, that Energy's servitude had prescribed through non-use as to all but Tract 1. In the concursus proceeding, the St. Martins seek the deposited royalties; a declaratory judgment that they own the minerals under all the land and that Energy's servitude is invalid; and damages. That action is before the state district court.

This Action

In this action, filed in November, 1998, Energy sues the St. Martins and Louisiana Land and Exploration Company ["LL&E"], asserting diversity jurisdiction. Energy avers that the St. Martins granted an oil and gas lease to LL&E covering the tract at issue herein, which lease has interfered with Energy's mineral servitude as to that tract. Energy seeks a declaratory judgment that its servitude is valid and that the St. Martin/LL&E lease is void, and an injunction preventing the St. Martins from interfering with Energy's use and management of its servitude.

DISCUSSION

In their motion, the St. Martins present alternative arguments. First, while there is diversity of citizenship between the parties now in this action, the St. Martins contend that there are additional indispensable parties who must be added, and they are not of diverse citizenship, so the Court has no jurisdiction of the action. Second,

the St. Martins suggest that the Court should abstain from this matter because the issue of Energy's mineral servitude as to the tract herein is before the state court in the concursus proceeding.

Jurisdiction

As to a lack of jurisdiction because of non-diverse indispensable parties, the St. Martins aver that they have sold 10% of their interest in the tracts involved in the state concursus action and the tract in this action to Quality Environmental Processes, Inc. ["Quality"]. They point out that in the concursus proceeding Energy has asserted that Phillips Petroleum Company ["Phillips"] owns 60% of the minerals underlying portions of Tract 1 (not the tract at issue herein). Both Quality and Phillips are Delaware corporations. Therefore, the St. Martins contend, Quality and Phillips are indispensable opposing parties to this action, and are not of diverse citizenship.

Energy has shown by affidavit that Phillips has no interest in the minerals underlying the tract involved in this action. The right to minerals in Tract 1, as to which Phillips may have an interest, is not before this Court. Phillips is not an indispensable party to this action and so does not destroy diversity jurisdiction.

Abstention

The St. Martins contend the Court should abstain from addressing this matter in favor of the allegedly

parallel state concursus action. The parties disagree as to whether the Court, in considering abstention, should consider the stringent *Colorado River*[4]/*Moses H. Cone*[5] factors for abstention generally, or the less stringent factors set out in *Rowan Companies, Inc. v. Griffin,* 876 F.2d 26, 29 (5th Cir.1989) for abstention in a declaratory judgment situation. All the cited abstention doctrines apply only if there are parallel state and federal actions. Therefore, the Court need not consider any of those matters unless the state concursus action is parallel with this action, *i.e.,* if this state concursus is an action in which the issue of Energy's servitude as to the tract at issue in the instant action can be resolved. It is not.

In this state concursus action, the oil producing companies seek resolution of disputed claims to the royalty proceeds from only Tracts 1 and 2. However, by their reconventional demand, the St. Martins have sought to bring into this concursus action the matter of their title to the tract at issue herein and to the rest of their land, as well as the issue of Energy's alleged servitude on all the St. Martin's land. But, under Louisiana law,

> In a concursus proceeding, the jurisdiction of the court is limited to disposing of the fund on deposit and relieving the stakeholder from further liability to the impleaded claimants arising out of or as a result of the stakeholder's ownership or possession of the fund.

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[4] *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 96 S.Ct. 1236 (1976).

[5] *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 103 S.Ct. 927 (1983).

Landry and Passman Realty, Inc. v. Beadle, Swartwood, Wall & Associates, Inc., 303 So.2d 761, 763 (La.App.1st Cir.1974), *writ refused*, 307 So.2d 631 (1975).

A claimant's reconventional demand seeking to expand a concursus proceeding to include issues beyond the resolution of claims to the fund is improper. See *Placid Oil Company v. Young*, 246 So.2d 306 (La.App.3d Cir.), *writ refused*, 249 so.2d 201 (La. 1971). In *Young*, in 1934 the "Emerson Group" sold 60 acres of land to the ancestors-in-interest of the "Young Group." In 1963, the Young Group gave oil, gas and mineral leases to Placid Oil covering only 20 of the 60 acres. Placid Oil instituted a concursus proceeding to determine the ownership of royalties from oil production on that 20 acres only, naming the Emerson Group and the Young Group as claimants.

In that concursus, the Emerson Group, in addition to claiming ownership of the 20 acres and the royalties in the concursus fund, also presented a reconventional demand seeking a judgment that they owned the adjacent 40 acre tract as well. The trial court struck that demand, and the appellate court affirmed, stating:

> We agree that . . . in a case such as this it is necessary to consider and to determine the ownership of the land and the royalty rights relating to that land before the ownership of the accrued royalties can be determined. The reconventional demand filed by the Emerson Group in this case, however, at least insofar as it relates to the 40-acre tract of land, is simply a petitory action and a slander of titles suit affecting an entirely separate tract of land which is not involved in the concursus. The issues presented by the concursus proceeding relate solely to the ownership of the

> royalties which have accrued or which may accrue from production on the 20-acre tract, and it is immaterial to a determination of those issues whether the Emerson Group does or does not own the adjacent 40-acre tract. [246 So.2d 308.]

That is the situation here.

This state concursus action involves only Tracts 1 and 2 of the St. Martin's land. The state court's jurisdiction is limited to disposing of the royalties from oil production on only those tracts. The St. Martin's ownership of other land, including the tract at issue herein, and the issue of Energy's servitude on land other than Tracts 1 and 2 are immaterial to the concursus. The St. Martin's attempt to expand the concursus by a reconventional demand into a suit involving land other than Tracts 1 and 2 is improper; and their reconventional demand is subject to immediate dismissal by the state court.

The instant action involves the matter of Energy's servitude as to a tract of land which is not properly at issue in any state court action. There is no parallel state court action in favor of which this Court should abstain.

Conclusion

For the foregoing reasons, the motion of defendants for dismissal or abstention is **DENIED**.

New Orleans, Louisiana, this 9th day of March, 1999.

/s/ Charles Schwartz, Jr.
UNITED STATES
DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 01-30266

ENERGY DEVELOPMENT CORPORATION

Plaintiff-Appellee

v.

MICHAEL X ST. MARTIN; VIRGINIA RAYNE ST MARTIN; QUALITY ENVIRONMENTAL PROCESSES INC

Defendants-Appellants

THE LOUISIANA LAND AND EXPLORATION COMPANY

Defendant-Counter Plaintiff

v.

SAMUEL J STAGG, III, MD, husband of; JULIE M STAGG; JAMES G FISTER, husband of; LINDA F FISTER; BAYOU AREA CHILDREN'S FOUNDATION INC

Counter Defendants-Appellants

ENERGY DEVELOPMENT CORPORATION

Plaintiff-Appellee

v.

MICHAEL X ST MARTIN; VIRGINIA RAYNE ST MARTIN; QUALITY ENVIRONMENTAL PROCESSES INC

Defendants-Appellants

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING EN BANC

(Filed Dec. 03, 2002)

(Opinion 2/20/02, 5 Cir. ___, ___ F.3d ___)

Before GARWOOD, JOLLY, and DAVIS, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. AND 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. AND 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. EUGENE DAVIS
United States District Judge

* Judge Wiener did not participate in the consideration of the rehearing en banc.

APPENDIX F

28 U.S.C. § 1738, Full Faith and Credit

UNITED STATES CODE ANNOTATED TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE PART V – PROCEDURE CHAPTER 115 – EVIDENCE; DOCUMENTARY § 1738. State and Territorial statutes and judicial proceedings; full faith and credit

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

LSA-R.S. 13:4231, Res Judicata

WEST'S LOUISIANA STATUTES ANNOTATED
LOUISIANA REVISED STATUTES TITLE 13.
COURTS AND JUDICIAL PROCEDURE CHAPTER 23.
JUDGMENTS PART II. RES JUDICATA
§ 4231. Res judicata

§ 4231. Res judicata

Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:

(1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.

(2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.

(3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

La. Code Civ. Proc. art. 425, Preclusion by judgment

WEST'S LOUISIANA STATUTES ANNOTATED
LOUISIANA CODE OF CIVIL PROCEDURE ACTS 1960,
NO. 15 BOOK I. COURTS, ACTIONS, AND PARTIES
TITLE II. ACTIONS CHAPTER 1. GENERAL
DISPOSITIONS Art. 425. Preclusion by judgment

Art. 425. Preclusion by judgment

A. A party shall assert all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation.

* * *

COMMENT – 1990

1999 Main Volume

This amendment expands the scope of this Article to reflect the changes made in the defense of res judicata and puts the parties on notice that all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation must be raised.

La. Code Civ. Proc. art. 531, Lis Pendens

WEST'S LOUISIANA STATUTES ANNOTATED
LOUISIANA CODE OF CIVIL PROCEDURE ACTS 1960,
NO. 15 BOOK I. COURTS, ACTIONS, AND PARTIES
TITLE II. ACTIONS CHAPTER 3. LIS PENDENS
Art. 531. Suits pending in Louisiana court or courts

Art. 531. Suits pending in Louisiana court or courts

When two or more suits are pending in a Louisiana court or courts on the same transaction or occurrence, between the same parties in the same capacities, the defendant

may have all but the first suit dismissed by excepting thereto as provided in Article 925. When the defendant does not so except, the plaintiff may continue the prosecution of any of the suits, but the first final judgment rendered shall be conclusive of all.

La. Code Civ. Proc. art. 2123, Suspensive Appeals

WEST'S LOUISIANA STATUTES ANNOTATED
LOUISIANA CODE OF CIVIL PROCEDURE ACTS 1960, NO. 15 BOOK III. PROCEEDINGS IN APPELLATE COURTS TITLE I. APPELLATE PROCEDURE
CHAPTER 2. PROCEDURE FOR APPEALING
Art. 2123. Delay for taking suspensive appeal

Art. 2123. Delay for taking suspensive appeal

A. Except as otherwise provided by law, an appeal that suspends the effect or the execution of an appealable order or judgment may be taken, and the security therefor furnished, only within thirty days of any of the following:

* * *

La. Code Civ. Proc. art. 2163,
Peremptory Exception in Appellate Court

WEST'S LOUISIANA STATUTES ANNOTATED
LOUISIANA CODE OF CIVIL PROCEDURE ACTS 1960,
NO. 15 BOOK III. PROCEEDINGS IN APPELLATE
COURTS TITLE I. APPELLATE PROCEDURE
CHAPTER 3. PROCEDURE IN APPELLATE COURT
Art. 2163. Peremptory exception filed in appellate
court; remand if prescription pleaded

Art. 2163. Peremptory exception filed in appellate court; remand if prescription pleaded

The appellate court may consider the peremptory exception filed for the first time in that court, if pleaded prior to a submission of the case for a decision, and if proof of the ground of the exception appears of record.

* * *

La. Code Civ. Proc. art. 2166, Finality of Judgments

WEST'S LOUISIANA STATUTES ANNOTATED
LOUISIANA CODE OF CIVIL PROCEDURE ACTS 1960,
NO. 15 BOOK III. PROCEEDINGS IN APPELLATE
COURTS TITLE I. APPELLATE PROCEDURE
CHAPTER 3. PROCEDURE IN APPELLATE COURT
Art. 2166. Rehearing, court of appeal
judgment; finality; stay

Art. 2166. Rehearing, court of appeal judgment; finality; stay

* * *

E. If an application for certiorari to the supreme court is timely filed, a judgment of the court of appeal becomes final and definitive when the supreme court denies the

application for certiorari. The supreme court may stay the execution of the judgment of the court of appeal pending a timely application for certiorari or an appeal to the United States Supreme Court.

La. Code Civ. Proc. art. 2167, Finality of Judgments

WEST'S LOUISIANA STATUTES ANNOTATED
LOUISIANA CODE OF CIVIL PROCEDURE ACTS 1960, NO. 15 BOOK III. PROCEEDINGS IN APPELLATE COURTS TITLE I. APPELLATE PROCEDURE
CHAPTER 3. PROCEDURE IN APPELLATE COURT
Art. 2167. Rehearing, supreme court judgment; finality; stay

Art. 2167. Rehearing, supreme court judgment; finality; stay

* * *

A judgment of the supreme court becomes final and definitive when the delay for application for rehearing has expired and no timely application therefor has been made. When an application for rehearing has been applied for timely, a judgment of the supreme court becomes final and definitive when the application is denied. The supreme court may stay the execution of the judgment pending a timely application for certiorari or an appeal to the United States Supreme Court.

LSA-R. S. 9:2721, Public Records

WEST'S LOUISIANA STATUTES ANNOTATED
LOUISIANA REVISED STATUTES TITLE 9.
CIVIL CODE ANCILLARIES CODE BOOK III –
OF THE DIFFERENT MODES OF ACQUIRING
THE OWNERSHIP OF THINGS CODE TITLE IV –
CONVENTIONAL OBLIGATIONS OR CONTRACTS
CHAPTER 2. REGISTRY OF INSTRUMENTS
AFFECTING IMMOVABLES PART I. GENERAL
PROVISIONS § 2721. Filing in office of parish recorder

§ 2721. Filing in office of parish recorder

A. No sale, contract, counter letter, lien, mortgage, judgment, surface lease, oil, gas or mineral lease, or other instrument of writing relating to or affecting immovable property shall be binding on or affect third persons or third parties unless and until filed for registry in the office of the parish recorder of the parish where the land or immovable is situated. Neither secret claims or equities nor other matters outside the public records shall be binding on or affect such third parties.

* * *

LSA-R.S. 31:76, Mineral Servitudes

WEST'S LOUISIANA STATUTES ANNOTATED
LOUISIANA REVISED STATUTES TITLE 31.
MINERAL CODE CHAPTER 4. THE MINERAL
SERVITUDE PART 7. TRANSACTIONS INVOLVING
OUTSTANDING MINERAL SERVITUDES
§ 76. Expectancy of extinction not an article of commerce

§ 76. Expectancy of extinction not an article of commerce

The expectancy of a landowner in the extinction of an outstanding mineral servitude cannot be conveyed or reserved directly or indirectly.

La. Civ. Code art. 730, Interpretation of Servitudes

WEST'S LOUISIANA STATUTES ANNOTATED
LOUISIANA CIVIL CODE BOOK II. THINGS AND
THE DIFFERENT MODIFICATIONS OF OWNERSHIP
TITLE IV. PREDIAL SERVITUDES CHAPTER 4.
CONVENTIONAL OR VOLUNTARY SERVITUDES
SECTION 2. ESTABLISHMENT OF PREDIAL
SERVITUDES BY TITLE Art. 730.
Interpretation of servitude

Art. 730. Interpretation of servitude

Doubt as to the existence, extent, or manner of exercise of a predial servitude shall be resolved in favor of the servient estate.

Fed. R. Civ. Proc. 12(h)(3), Defenses and Objections

UNITED STATES CODE ANNOTATED FEDERAL RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS III. PLEADINGS AND MOTIONS Rule 12. Defenses and Objections – When and How Presented

Rule 12. Defenses and Objections – When and How Presented – By Pleading or Motion – Motion for Judgment on Pleadings

* * *

(h) Waiver or Preservation of Certain Defenses.

* * *

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

APPENDIX G

ENERGY DEVELOPMENT CORPORATION

VERSUS

QUALITY ENVIRONMENTAL PROCESSES, INC., MICHAEL X. ST. MARTIN, AND VIRGINIA RAYNE ST. MARTIN

NO. 00-CA-314

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

APPEAL FROM THE TWENTY-FOURTH
JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
DOCKET NO. 511546, DIVISION "G"
HONORABLE ROBERT PITRE, PRESIDING

H. CHARLES GAUDIN
JUDGE, PRO TEMPORE

DECEMBER 4, 2000

Court composed of Judges Sol Gothard, Clarence E. McManus, and H. Charles Gaudin, Pro Tempore

A. J. Gray, III
The Gray Law Firm
Post Office Box 1467
Lake Charles, LA 70602-1467
Counsel for defendant-appellee

and

John M. Mamoulides
3421 N. Causeway Boulevard
Suite 601
Metairie, LA 70002
Counsel for defendant-appellee

James A. Barton, III
David R. Richardson
John F. Whitney
Barton Richardson, Canseco & Whitney, L.L.P.
228 St. Charles Avenue, Suite 724
New Orleans, Louisiana 70130
Counsel for plaintiff-appellant

and

Raymond Hoffman, Jr.
3900 Veterans Boulevard, Suite 200
Metairie, Louisiana 70006
Counsel for plaintiff-appellant

AFFIRMED

Plaintiff/appellant Energy Development Corporation ("EDC") appeals from a district court judgment extinguishing its mineral servitude and/or mineral rights on land owned by defendants/appellees Quality Environmental Processes, Inc., Michael X. St. Martin and Virginia R. St. Martin ("St. Martin group") in Terrebonne Parish.

The trial judge in the 24th Judicial District Court found that the servitudes were extinguished by prescription based on 10 years of nonuse.

We affirm. A reversal in this complex boundary dispute would require an impermissible substitution of our judgment for that by the trial court, there being no manifest error.

Each side called a professional land surveyor. In a case-deciding credibility evaluation, the trial judge found the St. Martin group's expert more persuasive, particularly with regard to the single, contiguous nature of the

leased area claimed by EDC as opposed to the noncontiguousness of the same property as advertised by the St. Martin group.

This case involves a dispute over mineral servitude and/or mineral rights on land known as the "Protective Area" and the "Productive Area" in the Sunrise Field Area. The "Productive Area" is situated within the "Protective Area."

In a deed dated August 31, 1966, Southdown, Inc. conveyed to Southdown Exploration, Inc., the right to oil, gas and other minerals within the "Productive Area." Southdown, Inc. was also obligated to convey rights, title and interest in and to any sand in the "Protective Area" when and if such sand is productive or capable of production of oil, gas or other minerals. Attached to and made part of the August 31, 1966 document (the consideration for which was $1,000.00) are eight maps or sketches but no surveys showing numerous areas in St. James, Lafourche and Ascension parishes as well as Terrebonne Parish. Also part of the August 31, 1966 deed is a listing of approximately 60 areas covered by the document.

By name change dated April 25, 1967, Southdown Exploration, Inc. became Southdown Burmah Oil Company. Southdown transferred 40 percent of all its assets, including the mineral servitude and mineral rights acquired under the August 31, 1966 deed, to Pelto Oil Company. By name change dated February 12, 1970, Southdown Burmah Oil Company became Burmah Oil Development, Inc.

On June 17, 1970, Southdown, Inc. sold its fee title interest to all of its land, including the lands located in all "Productive Areas" and "Protective Areas" to Southdown Lands, Inc. which, by deed dated May 3, 1971, purported

to convey to Pelto Oil Company a mineral servitude covering all of its interest in and to all oil, gas and minerals in the lands then owned by Southdown Lands, Inc., including those lands located in the "Protective Area" of the Sunrise Field Area. This deed contained this express exception:

> "There is excepted from the conveyance here made all lands and mineral rights heretofore conveyed or transferred by Vendor or its predecessors in title to third parties or terminated by prescription."

Pelto Oil Company is the ancestor in title of EDC. The St. Martins acquired the land located in the Sunrise Field Area, subject to any mineral servitudes and mineral rights presently in existence, on June 23, 1992. Quality Environmental [ ] acquired its ownership interest in 1994. As landowners, they are attempting to enforce the 10-year prescription of nonuse stated in LSA-R.S. 31:16, which is Article 16 of the Louisiana Mineral Code. EDC, claiming mineral servitudes, bears the burden of showing that its rights have been sufficiently used to prevent the accrual of prescription, as stated in Article 764 of the Louisiana Mineral Code.

Consideration for the May 3, 1971 conveyance to Pelto Oil Company was $100.00. Attached to this deed was a listing of 28 properties and five amendments, including this reference to lands concerned with the present case:

Terrebonne COB 496 Entry No. 383344

All of the other listings were in three State of Mississippi counties or in numerous Louisiana parishes other than Terrebonne.

On June 5, 1997, the St. Martin group informed EDC that it sought to extinguish any mineral rights EDC might have in the "Protective Area" due to a 10-year prescription of nonuse. In response, EDC filed a petition for declaratory judgment and permanent injunction on July 7, 1997. In the petition, EDC alleged that its mineral rights and servitudes were not extinguished by the terms of the 1966 conveyance, but rather were governed by the 1971 conveyance and had not prescribed by 10 years of nonuse. On August 5, 1997, the St. Martin group filed an answer and reconventional demand against EDC. On August 26, 1997, EDC filed an answer to the reconventional demand.

The St. Martin group filed a motion for summary judgment on February 2, 1998. EDC filed its motion for summary judgment on April 9, 1998. Both motions were heard on May 1, 1998. On June 15, 1998, the trial judge rendered written judgment with reasons granting the St. Martin group's motion for summary judgment and denying EDC's motion. The trial court ruled that the mineral servitudes and rights burdening the "Protective Area" stemmed from the 1966 conveyance and that these mineral servitudes and rights had been extinguished by prescription based upon 10 years of nonuse.

EDC appealed the June 15, 1998 ruling granting summary judgment in favor of the St. Martin group. On May 19, 1999, the Fifth Circuit Court of Appeal vacated the judgment of the trial court and remanded the case for further proceedings. This Court found that there were material issues of fact in dispute as to the nature, extent and prescription of EDC's mineral rights in the "Protective Area" pursuant to the 1971 conveyance to Pelto.

On remand, the merits of this case were heard on October 25-27, 1999. On December 17, 1999, the trial court issued its written judgment with reasons in favor of the St. Martin group and against EDC. The trial court ruled that the mineral servitudes and rights burdening the "Protective Area" of the Sunrise Field Area stemmed from the 1966 conveyance and that those mineral servitudes or rights had been extinguished by prescription based on 10 years of nonuse. The trial judge also found (1) that the area claimed by EDC was not one large contiguous area and (2) that the omnibus property description attached to the 1971 conveyance was not adequate to put third parties on notice as to which properties were being encumbered.

On appeal, EDC assigns these district court errors:

(1) The trial judge refused to follow this Court's May 9, 1999 opinion in which was established "the law of the case,";

(2) The trial judge was wrong in rejecting EDC's proof of the nature, extent and (interruption of) prescription of its mineral rights in the subject "Protective Area"; and

(3) The trial judge erred in finding that the property description in the 1971 conveyance was omnibus and not adequate to put third parties on notice.

ASSIGNMENT NO. 1

EDC alleges that the trial court, on remand, erred in refusing to follow findings of this Court's May 19, 1999 opinion, which was established as the "law of the case." Under the "law of the case" doctrine, an appellate court

will usually not reconsider its own rulings of law in the same case.

While we agree with this Court's previous ruling vacating summary judgment, we note that the entirety of the evidence was not before the trial court (or this Court) at that time. The thrust of and the only significant, lasting findings in the May 19, 1999 opinion were that material and untried issues precluded summary judgment and that a complete trial was necessary. The district judge, after a mandated, full trial was free to make findings independent of the May 19, 1999 remand decree.

In *Day v. Campbell-Grosjean Roofing and Sheet Metal Corporation,* 260 La. 325, 256 So.2d 105 (La. 1971), the Louisiana Supreme Court discussed at length the "law of the case" concept and stated that while a court will generally decline to reconsider prior rulings, the policy applies only against those who have had their day in court. Before the merits of the instant case were heard on October 25-27, 1999, neither the EDC nor the St. Martin group had "their day in court."

At the full trial, various witnesses were called, including experts by each side, and numerous documents placed in evidence, including some not attached to the motions for summary judgment.

EDC argues that there are findings in the May 19, 1999 opinion binding the trial court on remand, findings which the trial judge did not adhere to. The St. Martin group disagrees, saying that the trial judge on remand did as directed. In any scenario, the May 19, 1999 decree was issued before the complete trial and cannot be considered "law of the case" except to the extent that summary

adjudication was inappropriate and that a thorough trial was imperative.

In any event, the question of whether the 1971 conveyance established one large contiguous servitude or two or more noncontiguous servitudes was not directly before this Court when summary judgment was set aside and the case remanded.

ASSIGNMENT NO. 2

In this allegation of error, EDC argues that the trial judge wrongfully rejected proof of the nature, extent and (interruption of) prescription of its mineral rights in the "Protective Area."

The May 3, 1971 conveyance did not describe the area in Terrebonne Parish covered by the servitude except by reference to Terrebonne Parish COB 496, Entry No. 38344, which is the fee title conveyance from Southdown, Inc. to Southdown Lands, Inc. The entry at COB 496 contains property descriptions by reference to various recorded instruments, including an Act of Mortgage dated September 8, 1944 by Realty Operations, Inc., in favor of Jefferson Standard Life Insurance Company, registered in Terrebonne Parish MOB 90, folio 342. This 20-page act contains descriptions of many and varied parcels of land.

EDC contends, accordingly, that the 1971 instrument conveyed a mineral servitude on the subject "Protective Area" and other contiguous lands by reference to a previously recorded conveyance (from Southdown, Inc., to Southdown Lands, Inc.), which in turn contained a property description by reference to a previously recorded mortgage (the 1944 act). This, EDC submits, is a three-link chain

of recorded instruments with an ascertainable property description constituting real, visible notice to third parties contained in the 1944 mortgage.

As plaintiff, EDC have bore [sic] the burden of proving its case. EDC submitted 179 documents and the testimony of three witnesses, primarily that of its expert Ralph Gipson, who manages the New Orleans branch office of C.H. Fenstermaker and Associates, a land surveying firm headquartered in Lafayette, Louisiana. Mr. Gipson did not survey anything in or around land owned by the St. Martin group; instead, he testified from information, charts, etc., pulled from the Fenstermaker data base.

Mr. Gipson produced various documents and computer-generated plats showing where he thought the "Protective Area" was located. His main exhibit, the "Fenstermaker base map," is a composite of data and information from various sources not contained in public records. Regarding the "Fenstermaker base map," Mr. Gipson was asked this question: "What degree of confidence do you have that you have, in your hand-colored maps and in your computer-generated copy, located the geographical extent of the large continuous area, including the property which is the subject of this suit, that is the Protective Area described in the August 31, 1966 agreement, by reference to the Mortgage (of 1944) . . . ?"

He said that he had "complete confidence" that the hand-colored map was "an accurate portrayal of the mortgage area" and that the land involved was a single, large contiguous tract. This is an important factor in EDC's claim because drilling on any part of a large contiguous area would interrupt prescription on the whole. There had been no drilling in the "Protective Area" in

dispute to defeat prescription, although evidence shows drilling elsewhere.

Mr. Gipson admitted, however, that no actual surveys had been done by him or anyone under his direction. He explained that an on-the-ground survey would involve a search for physical occupation and monuments; this information would then be analyzed and plotted and inverted into a map. Such a procedure, Mr. Gipson said, would be time consuming and very expensive. None of the documents Mr. Gipson testified from, particularly the "Fenstermaker base map," was what he called "a boundary survey" and he added that he was "not going to sign this thing and say that it is."

Regarding the land covered in the 1966 lease, Mr. Gipson said that " . . . certainly a survey would have solved that issue. I guess we wouldn't be here if it had been surveyed."

Even though the 1966 conveyance did not contain any surveys, it did grant certain mineral rights on noncontiguous tracts of land in the "Protective Area." While the parties appear to agree that this conveyance granted mineral rights to noncontiguous tracts of land, they differ on their interpretation of the 1971 conveyance. EDC believes that the 1971 conveyance granted mineral rights on a single contiguous tracts [sic] of land, which included the noncontiguous tract listed in the 1966 conveyance. The St. Martin group contends that the 1971 conveyance did not form one single contiguous servitude which included the "Protective Area," but instead created two noncontiguous tracts. The trial court held that the testimony and evidence established that the properties in question were not contiguous and that, because they are not contiguous,

the drilling on certain tracts of land by EDC did not interrupt the prescription of nonuse as to all of the tracts of land, including those owned by the St. Martin group.

Also, the trial judge found that the "Protective Area" was sufficiently burdened by the 1966 conveyance to except it from the 1971 conveyance, in accord with the clause in the 1971 conveyance excepting "mineral rights heretofore conveyed or transferred . . . or terminated by prescription."

In reaching these conclusions, the trial judge obviously was guided by the testimony of Charles Camp, the St. Martin group's expert with 26 years experience as vice president in charge of land surveying for T. Baker Smith and who had done on-the-ground surveys of land in and around the St. Martin tracts. He stated that he had "actually gone out there" and surveyed the land involved in this lawsuit "many times."

Mr. Camp disagreed with Mr. Gipson's calculations, as did the trial judge in his 19-page "Reasons for Judgment."

To show the existence of one large contiguous tract stemming from the 1971 conveyance and ultimately the 1944 mortgage, Mr. Gipson made use of various maps, plots and descriptions which were in no way related or connected to the 1944 mortgage. Mr. Camp's surveys and his direct testimony showed, as he stated, that " . . . the property is not contiguous."

The trial judge also found that because Southdown, Inc. was obligated by the 1966 deed to transfer rights, title and interest to any sand in the "Protective Area" when and if there was production or the capability of production, this impediment prohibited Southdown, Inc. from conveying

mineral rights to any other party. Such a burden, the trial judge said, constituted "a mineral right heretofore conveyed" and was within the scope of the exclusion clause of the May 3, 1971 conveyance.

On review of all of the testimony and consideration of all pertinent documents, particularly the 1971 conveyance, the title sale of Southdown, Inc. to Southdown Lands, Inc., the 1966 deed, the 1944 mortgage and the various maps and/or charts purporting to show the "Protective Area," we see no manifest error, especially in the trial judge's reliance on Mr. Camp's conclusions and opinions.

ASSIGNMENT NO. 3

Here, EDC contends that the trial judge erred in deciding that the property description in the 1971 conveyance was omnibus and was not sufficient under Louisiana law to put third parties like the St. Martins on notice that, for the sum of $100.00, the "Protective Area," along with considerable other real estate, was encumbered by the mineral lease.

There is no mention of the "Protective Area" in the 1971 conveyance. Third parties are referred to "COB 496, entry 383344, in Terrebonne Parish," which is the Southdown, Inc. to Southdown Lands, Inc. sale. Third parties are then referred by this act to the multi-paged 1944 mortgage in MOB 90, folio 342, Terrebonne Parish. Neither the "Protective Area" nor the servitude area claimed by EDC are described nor even mentioned in the 1944 mortgage. The mortgage does list various plantations and other parcels of land, beginning with the Ardoyne Plantation, but no surveys are attached.

The Louisiana Supreme Court and other state courts have consistently held that property descriptions must be sufficiently specific so that third parties can locate and identify the property. The general rule is that the description must fully appear within the four corners of the instrument or that the deed should refer to some map, plat or another deed as part of the description, so that the same may be clear.

Clearly, an adequate description of EDC's alleged servitude does not appear in the 1971 conveyance, wherein the only reference to the Terrebonne Parish property is the COB and entry numbers. An adequate description is not contained in the Southdown, Inc. to Southdown Lands, Inc. deed, which only refers third parties to the 1944 mortgage. The 1944 mortgage, Mr. Gipson admitted, is a "conglomerate of earlier descriptions" of various tracts of land and cannot serve as a sufficient property description of EDC's claimed servitude area. Even the expert land surveyors had difficulty deciding on the servitude's boundary. In Mr. Gipson's testimony trying to fix the location of EDC's servitude from information contained in the 1944 mortgage, he relied on maps, plats and descriptions which are not part of the public records and which were certainly not within the four corners of either the 1971 conveyance, the Southdown, Inc. to Southland Lands, Inc. sale, or even the 1944 mortgage itself.

Attached to and made part of this opinion is the wordy 1944 mortgage, which EDC argues contains a legally sufficient description of property mentioned only by COB reference in the 1971 conveyance and by MOB reference in the Southdown, Inc. to Southland Lands, Inc. act. We are, however, unaware of any Louisiana Supreme Court or appellate court opinion approving a three-step property

description when the third and key step is a description as inexact (as far as EDC's servitude and the "Protective Area" are concessed) of the 1944 mortgage.

Mr. Gipson began his description of the purported servitude by referring to "Parcel B" on the fifth page of the mortgage. Third parties lack Mr. Gipson or Mr. Camp's expertise and even the expert land surveyors differed as to where EDC's alleged servitude was situated.

The trial judge stated that in Mr. Gipson's struggle to interpret the 1944 mortgage and describe the purported servitude," he (Gipson) referred to more than 100 documents which were not referred to in either the 1971 conveyance or in the 1944 mortgage. The trial judge found that EDC had not established the boundaries of its servitude by and from information pulled from the 1944 mortgage and that consequently there could not have been legally adequate notice to third parties. This determination is supported by testimony and evidence.

This Court's earlier decree vacating summary judgment stated that the property description in the 1971 conveyance – i.e., COB 496, entry number 383344 – has adequate notice to third parties because the reference is to another conveyance in the public records (the Smithdown, Inc. to Southland Lands, Inc. sale). We note two things. Firstly, this issue was not there before this Court. There had been no trial; the record did not fully contain testimony about the extreme difficulty of extracting even approximate servitude boundaries from the 1944 mortgage. Secondly, if this Court's earlier declaration on this issue can be construed as "law of the case," which we do not believe it can, then it would be appropriate for this Court now to revisit this issue to correct palpable error

and prevent manifest injustice. Testimony and evidence addressed at trial would mandate a recommendation of the earlier opinion, except with regard to the remand order because of triable issues.

The trial court judgment of December 17, 1999 is affirmed.

AFFIRMED

[1944 Mortgage Omitted In Printing]

APPENDIX H

24TH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 511-546 **DIVISION "G"**

ENERGY DEVELOPMENT CORPORATION

-VERSUS-

QUALITY ENVIRONMENTAL PROCESSES, ET. AL.

FILED: Dec. 17, 1999 /s/ Lester J. Fonseca
DEPUTY CLERK

JUDGMENT

On the 25th, 26th and 27th days of October, 1999, this matter was tried before the Honorable Robert A. Pitre, Jr.

PRESENT: James Barton, III, attorney for
ENERGY DEVELOPMENT
CORPORATION, and
A. J. Gray, III and John M. Mamoulides,
attorneys for
QUALITY ENVIRONMENTAL
PROCESSES, INC., et al

After reviewing all pleadings, stipulations and evidences, and hearing the arguments of counsel, the court considering the law and the evidence to be in favor of the defendant-plaintiff in reconvention, Quality Environmental Processes, Inc., and against the plaintiff-defendant in reconvention, Energy Development Corporation. Accordingly;

IT IS ORDERED ADJUDGED AND DECREED that the mineral servitudes and rights burdening the

Protective Area of the Sunrise Field stem from an instrument executed between Southdown, Inc. and Southdown Exploration, dated August 31, 1966;

IT IS FURTHER ORDERED ADJUDGED AND DECREED that those mineral servitudes or mineral rights have been extinguished by the prescription based on ten (10) years nonuse;

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the Omnibus property description attached as Exhibit "A" to the May 3, 1971 conveyance was not adequate to put third parties on notice as to which properties were being encumbered.

Judgment rendered and signed in Chambers on the 17th day of December, 1999, at Gretna, Louisiana.

/s/ Robert Pitre
JUDGE

24TH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 511-546 **DIVISION "G"**

ENERGY DEVELOPMENT CORPORATION

-VERSUS-

QUALITY ENVIRONMENTAL PROCESSES, ET. AL.

FILED: Dec. 17, 1999 /s/ Lester J. Fonseca
DEPUTY CLERK

REASONS FOR JUDGMENT

This matter came for trial before this Court on October 25, 26 and 27 of 1999. This court originally heard a joint motion for Summary Judgment filed on behalf of defendants-plaintiffs in reconvention, Quality Environmental Processes, Inc., Michael X. St. Martin and Virginia Rayne St. Martin (hereinafter referred to as the "St. Martin Group") and plaintiff-defendant in reconvention, Energy Development Corporation (hereinafter referred to as "EDC") on May 1, 1998. This court made certain findings of fact, mainly that the mineral servitudes and rights burdening the Protective Area of the Sunrise Field stem from an instrument executed between Southdown, Inc. and Southdown Exploration, dated August 31, 1966 and that those mineral servitudes or mineral rights have been extinguished by prescription based on ten (10) years nonuse.

EDC appealed that ruling to the Fifth Circuit Court of Appeals. The Fifth Circuit vacated and remanded this court's ruling on several grounds. The first centered around the question of whether "the creation of a conditional

obligation to transfer a mineral interest in the future is a conveyance for the purpose of exclusion from the 1971 agreement." *Energy Development Corp. v. Quality Environmental Processes, Inc.,* 734 So.2d 965 (La. App. 5 Cir. 1999). The Fifth Circuit concluded that the "1966 instrument only conveyed a conditional future interest in the listed sands." *Id.*

Additionally, the Fifth Circuit also concluded that the omnibus property description found in Exhibit "A" to the May 3, 1971 conveyance was adequate to put third-parties on notice since said exhibit "describes the property by reference to the other recorded conveyances in the public records." *Id.*

Lastly, the Fifth Circuit agreed with this court's finding that "EDC's rights under the 1966 agreement have prescribed as to any sands not conveyed [to EDC]. *Id.*

This suit was originally initiated with EDC seeking a Declaratory Judgment recognizing it to be the owner of certain mineral servitudes and a Permanent Injunction enjoining the St. Martin Group from interfering with its use and enjoyment of those mineral leases. This suit was initiated by EDC after demand [sic] were made upon it by the St. Martin Group to furnish a recordable act evidencing the extinguishment or termination of all mineral rights claimed by EDC in the lands at issue in the case at bar.

The St. Martin Group, in its answer, filed a Reconventional Demand, seeking a Declaratory Judgment and Permanent Injunction, alleging that there has been insufficient drilling upon or production from the Property (hereinafter referred to as the "Property") at issue to

interrupt prescription resulting from ten year nonuse as to any of EDC's mineral servitude or other mineral rights.

Both parties stipulated that the mineral servitudes or rights in dispute in this litigation lie underneath the Property within the areas known as the Sunrise Field Area of Terrebone [sic] Parish, Louisiana. The parties also stipulate that the mineral servitudes or mineral rights are all located entirely in what is known as the "Protective Area" of the Sunshine Field Area.

At issue in this dispute are two deeds that conveyed various interests concerning the Protective Area, an Act of Mineral Conveyance dated August 31, 1966, and subsequent Act of Mineral Conveyance dated May 3, 1971, but effective January 1, 1971. In reaching its conclusion, this Court scrutinized both documents.

In 1966, the lands involved in this lawsuit, and substantial other lands located in Terrebonne, Laforche, St. James and Ascension Parishes were owned by Southdown, Inc. On August 31, 1966, Southdown, Inc. conveyed to Southdown Exploration, Inc. certain mineral servitudes and mineral rights affecting the land at issue and other lands located in Terrebonne Parish. This August 31, 1966 deed is one of the basic title documents giving rise to the instant dispute between EDC and the St. Martin Group.

Insofar as the August 31, 1966 deed purported to affect lands located in the Sunrise Field Area of Terrebonne Parish, it conveyed to Southdown Exploration, Inc. certain mineral servitudes or mineral rights affecting an area labeled the "Productive Area" and an area identified as the "Protective Area." As previously stated, the land at issue is located entirely within that portion of the Protective Area. There is no dispute as to these basic material facts.

With respect to the lands located in the "Productive Area" to the August 31, 1966 deed, Southdown, Inc. conveyed to Southdown Exploration, Inc., "All of Grantor's right, title and interest in and to the oil, gas and other minerals" in said land. All parties agree that this language created a mineral servitude or servitudes as to contiguous lands included in the Sunrise Field Productive Area pursuant to the provisions of Articles 21, 24 and 27 of the Louisiana Mineral Code.

With respect to the "Protective Area" in the Sunrise Field Area as defined in the August 31, 1966 deed in which the lands at issue are located, Southdown, Inc. conveyed to Southdown Exploration, Inc. the right to receive assignments of oil, gas and minerals as to certain specifically defined "Known Productive Sands" when and if those sands were proven to be commercially productive in the Protective Area. The correct legal classification of these rights in the Protective Area of the Sunrise Farms Area is one of the basic issues of law presented in this proceeding. The pertinent operative language in the August 31, 1966 deed relative to the Protective Area reads as follows:

> As an essential and integral part of the consideration paid for this conveyance, Grantor binds and obligates itself to convey to Grantee, from time to time as required, all of its rights, title and interest in and to the oil, gas and other minerals in each known Productive Sand when and if said sand is established to be productive or capable of production in the Protective Area. It shall be considered that a Known Productive Sand in the Protective Area will have been established to be productive or capable of production when a well located in the Protective Area is

completed in such sand as a producer or as a well capable of production of oil and gas, or whenever any known Productive Sand in the Protective Area shall have been included within the geographical confines of a unit created for such sand by or pursuant to an order of the Louisiana Department of Conservation or other governmental agency having jurisdiction to create units, and said unit has, as the unit well, a well productive or capable of production. If and when any Known Productive Sand is established to be productive or capable of production within the Protective Area as above provided, Grantor shall then be obligated to convey to Grantee the mineral rights in said Known Productive Sand as to the entirety of that Protective Area; and this obligation shall exist irrespective or whether the productive portion of the Protective Area forms a common reservoir with the present Protective Area of said Known Productive Sand or is separate therefrom.

* * *

Each obligation to make such additional mineral conveyance as to Known Productive Sands shall arise immediately and automatically whenever any Known Productive Sand is established to be productive or capable of production in any portion of the Protective Area as provided above. This agreement and obligation of Grantor is and shall be a continuing one which shall be binding during the entire life of the mineral ownership of Grantor in the respective Productive Area; provided, that Grantor's obligation under this Agreement shall terminate and no longer be effective as to any mineral servitude created hereunder which may have prescribed.

Subsequent to the execution of the August 31, 1966 deed, Southdown Exploration, Inc. (a Louisiana Corporation) was merged into Southdown Exploration, Inc. (a Delaware Corporation), "and by name change dated April 25, 1967, Southdown Exploration Inc. became Southdown Burmah Oil Company." Thereafter, Southdown Burmah Oil Company transferred forty (40%) percent of all of its assets, including the mineral servitudes and mineral rights acquired under the August 31, 1966 deed to Pelto Oil Company. Subsequently, by name change dated February 12, 1970, Southdown Burmah Oil Company became Burmah Oil Development, Inc.

By 1970, as the result of the foregoing conveyances and transactions, the fee title to the lands at issue continued to be Southdown, Inc., and the mineral servitude and mineral rights affecting the Productive Area and the Protective Area in the Sunrise Field Area created by the August 31, 1966 deed were owned sixty (60%) percent by Burmah Oil Development, Inc. and forty (40%) percent by Pelto Oil Company. On June 17, 1970, Southdown, Inc. sold its fee title to the lands located in all Productive Areas and Protective Areas as described in the August 31, 1966 deed to Southdown Lands, Inc. Following that acquisitions [sic] the new fee owner, Southdown Lands, Inc., by deed dated May 3, 1971, but effective January 1, 1971, conveyed to Pelto Oil Company mineral servitudes covering all of its interest in and to all oil, gas and minerals in the lands then owned by Southdown Lands, Inc., including those lands located in the Protective Area of the Sunrise Field Area in which the lands at issue are located. This deed contained the very important express exception:

> There is excepted from the conveyance here made all lands and mineral rights heretofore conveyed or transferred by Vendor or its predecessors in title to third parties or terminated by prescription.

The interplay between this conveyance of mineral servitude to Pelto Oil Company, effective January 1, 1971, including the "exception" language quoted above, and the mineral servitude and mineral rights previously created by the August 31, 1966 deed is one of the basic issues presented to the Court in connection with this joint motion for Summary Judgment.

Subsequent to the conveyance of minerals to Pelto Oil Company, Michael X. St. Martin and Virginia Rayne St. Martin acquired the land located in the Sunrise Field Area, subject to any mineral servitudes and mineral rights presently in existence. That acquisition was the result of a series of mesne conveyances culminating in a Cash Sale Deed to the St. Martin's on June 23, 1992. The other defendant-plaintiff in reconvention, Quality Environmental Processes, Inc. (hereinafter referred to as "QEP") acquired its ownership interest in the property by virtue of a conveyance from the St. Martins dated August 15, 1994.

Thus, as of June 23, 1992, the fee title to the land at issue was owned by Michael X. St. Martin and Virginia Rayne St. Martin, subject to the mineral servitudes or mineral rights as to Known Productive Sands in the Protective Area of the Sunrise Field Area created by the preexisting conveyances, and further subject to the mineral conveyance to QEP pursuant to the August 15, 1994 conveyance.

As of June 23, 1992, the mineral servitudes or mineral rights as to Known Productive Sands in the Protective Area created by the August 31, 1966 conveyance were owned sixty (60%) percent by Burmah Oil Development, Inc. and forth (40%) percent by Pelto Oil Company. By a series of transactions and conveyances, the interest in these mineral servitudes and mineral rights owned by Burmah Oil Development, Inc. was ultimately acquired by Phillips Petroleum Company, and the interest owned by Pelto Oil Company was ultimately acquired by the plaintiff-defendant in reconvention, EDC.

EDC alleged at trial that its rights do not originate from the August 31, 1966 deed. EDC alleges that its mineral rights come from two other instruments: (1) The November 25, 1966 conveyance from Southdown, Inc. to Southdown Burmah Oil Company (name changed form Southdown Exploration, Inc.) and (2) Conveyance of Mineral Servitude dated May 3, 1971, effective January 1, 1971, from Southdown Lands, Inc. to Pelto Oil Company.

At the conclusion of the May 1, 1998 Summary Judgment, this court found that the November 25, 1966 Assignment did not create any servitudes burdening the St. Martin Land because the property was already burdened with multiple servitudes created by the August 31, 1966 instrument. The November 25, 1966 instrument was merely a specific assignment in "conformance with the obligations imposed upon Grantor in said [August 31, 1966] conveyance" of two Known Productive Sands (the #86 and #87 sands) located within the Protective Area.

Additionally, this court found that any rights of EDC recognized in the November 25, 1966 instrument were specifically released by EDC by an instrument captioned

"Release of Mineral Servitude" executed July 7, 1994. Notwithstanding the allegations of EDC's petition, all rights it ever held under the November 25, 1966 instrument were released by EDC several years prior to filing this suit and EDC currently holds no rights under the instrument.

As previously stated, EDC alleges that its rights come from the Mineral Conveyance dated May 3, 1971, effective January 1, 1971, by Southdown Lands, Inc. to Pelto Oil Company. The St. Martin Group submits that this instrument did not create any servitudes affecting the St. Martin Land for the following nonexclusive reasons: (1) the instrument expressly excepted from the conveyance "all lands and mineral rights heretofore conveyed or transferred by Vendor or its predecessors in title to third parties or terminated by prescription"; (2) the mineral rights involved in this litigation were previously conveyed or transferred by Southdown, Inc. (predecessor in title to Southdown Lands, Inc.) to a third party, *i.e.,* Southdown Exploration, Inc. by the August 31, 1996 instrument; and (3) the St. Martin Land was already burdened with multiple servitudes created by the August 31, 1966 instrument.

This court found as matter of law that the August 31, 1966 conveyance, and not the May 3, 1971 conveyance, affected the mineral servitudes and mineral rights of the Property at issue. That conclusion was based on three separate factors.

Firstly, that the Property was sufficiently burdened by the August 31, 1966 deed to except it from the May 3, 1971 deed. The language of the August 31, 1966 deed, cited above, forced an "obligation" on the part of Southdown, Inc. to make the appropriate conveyances when the

circumstances have been satisfied. Because of this obligation, Southdown, Inc. could not have conveyed the minerals to any other party. The minerals, had in effect, been taken out of commerce. The property was "burdened" by Southdown, Inc.'s "obligation" to make the conveyance when the circumstances were satisfied. Accordingly, this court found that the Protective Area was sufficiently "burdened" by the obligation of the landowner to make conveyances when the circumstances were satisfied. This "burden" constitutes a "mineral right heretofore conveyed" as excluded by the May 3, 1971 conveyance.

Secondly, the court found that the May 3, 1971 deed is not applicable because of the language in paragraph "5" of said deed which reads as follows:

> 5.) Vendor and Vendee herein agree to enter into such further formal instruments of conveyance, correction or otherwise, as may from time to time become necessary or desirable to effect a more complete conveyance of all oil, gas and other minerals owned by Vendor on this date of this Act of Conveyance.

This clause, the court found, was found to be significant since the document lacked an adequate property description, i.e., the document purports to convey property described as:

> . . . all of its [Southdown Lands, Inc.] right, title and interest in and to all oil, gas and other minerals located in, on or under all lands now or formerly owned by Vendor, wherever situated, including but not limited to, the lands listed on the Exhibit attached hereto as Exhibit 'A' . . .

As to the St. Martin Group, who are third parties to the May 3, 1971 conveyance, no mineral servitude was created by the document because the omnibus description was not sufficient to give notice to third parties.

The ambiguous property description also calls into play one additional Civil Code article not previously argued, i.e., Civil Code Article 730 which provides as follows:

> Doubt as to the existence, extent, or manner of exercise of a predial servitude shall be resolved in favor of the servient estate.

Accordingly, any doubt as to whether the May 3, 1971 Southdown Lands Mineral Conveyance created a mineral servitude within the Protective Area on the St. Martin Land should have resolved in favor of the St. Martin Group. This Court found that no such servitude was ever created.

Lastly, this Court concluded that EDC's interpretation of the relevant documents, *i.e.,* that the May 3, 1971 instrument created an additional mineral servitude on the St. Martin Land which was already burdened with a servitude created by the August 31, 1966 instrument, was violative of the public policy of Louisiana which disfavors the continued dismemberment of the title to immovable property, relying upon *Whitehall Oil Co. V. Heard.*

Accepting as correct this interpretation of the August 31, 1966 conveyance, which the Court has determined as a matter of law, the existing and vested separate mineral rights as to Known Productive Sands in the Protective Area (including the Sunrise Field Protective Area) were clearly excepted from the conveyance to Pelto Oil Company

on May 3, 1971, effective January 1, 1971. That conveyance to Pelto Oil Company clearly and specifically excepted from the minerals conveyed to Pelto Oil Company any ". . . mineral rights heretofore conveyed by Vendor or its predecessors in title to third parties or terminated by prescription." Note that this language of exception refers to "mineral rights" previously transferred and not just to "mineral servitudes." That broadly phrased exception makes sense when it is recognized that under the August 31, 1966 conveyance the fee title owner was required to transfer "all of its right, title and interest in and to oil and gas and other minerals in each Known Productive Sand when and if such sand is established to be productive or capable of production in the Protective Area." The conveyance of such rights in Known Productive Sands subsequently proven to be commercially productive could only have been made by the fee title owner. That follows because Article 24 of the Louisiana Mineral Code expressly provides that a mineral servitude "may be created only by a landowner who owns the right to explore for and produce minerals when the servitude is created." Thus, Pelto Oil Company could not have complied with the obligation to transfer "the oil and gas and other minerals" in a Known Productive Sand proven to be capable of commercial production, because it was not a landowner, but rather was the owner of a separate mineral servitude. Further, if the mineral rights as to Known Productive Sands had been included as part of the May 3, 1971 conveyance, as contended by EDC, the fee title owner could not have performed the obligations as to Known Productive Sands required by the August 31, 1966 conveyance because it would no longer have owned "the right to explore for and produce minerals" relative to Known Productive Sands.

As stated above, the Fifth Circuit remanded the court's earlier findings because there existed genuine issues of material fact which needed determination only after a trial on the merits. More specifically, the Court of appeal's ruled as follows:

> Having found that there is a question of material fact as to the nature, extent and prescription of EDC's mineral rights in the Protective Area (the St. Martin tracts) pursuant to the 1971 conveyance, we hereby vacate the trial court's grant of Summary Judgment, and remand for further proceedings.

734 So.2d at 972.

This court was confused by some of the language contained in the Fifth Circuit's opinion, more particularly, the following paragraph:

> This court questions whether the *creation of a conditional obligation to transfer a mineral interest in the future* is a conveyance for the purpose of exclusion from the 1971 agreement. However, we need not decide the case on that issue because we find that the 1966 conveyance was limited in nature. *The 1966 instrument only conveyed a conditional future interest in the listed sands.* All other mineral rights remained with the surface owner. The 1971 document conveyed "all of grantor's right, title and interest to all oil, gas and other minerals" located in the various tracts described by an attached exhibit, except what rights had been heretofore conveyed. As the 1966 obligation was limited to specific sands in the Protective Area, we find that there still existed mineral tights [sic] capable of being alienated in the Protective Area by the 1971 conveyance.

734 So.2d at 969. (Emphasis added.)

This court has trouble reconciling the two above italicized sentences as the Fifth Circuit seems to vacillate between Civil and Common Law theories. After an extensive search of the Common Law, this court could find only one case that used similar language to that cited by the Fifth Circuit, and that case was merely illustrative, although quite applicable.

In *Finn v. Cook,* a Federal case out of Wyoming Nelson assigned a mineral lease he obtained to D.L. Cook (hereinafter referred to as "Cook"), the defendant in the matter, who in turn "farmed out" portions of the leased properties to Kelly Oil and Gas Company (hereinafter referred to as "Kelly"), *North Finn v. Cook,* 825 F.Supp. 278 (D.Wyo 1993). Cook agreed that upon completion of a well capable of producing oil and/or gas in paying quantities, he would deliver to Kelly an assignment covering the 40 acre drill site, conveying all right, title and interest. *Id* at 280. At which point Cook would be reassigned by Farmee, a fully participating thirty (30%) percent "back-in" working interest. *Id.* The reason for structuring the deal this way was to allow Kelly, the driller, to take all of the tax deductions associated with drilling the well. *Id.* Payout to Cook is in the form of the reassignment. *Id.*

Plaintiff in this matter purchased the property at issue at sheriff's sale after Kelly failed to pay bills for drilling and completing the wells. *Id.* Cook contends that since the well was not capable of producing oil and/or gas in paying quantities, the working interest that was conveyed to Kelly was burdened with his reversionary interest, and therefore the liens filed in the foreclosure

proceeding could not attach to his thirty (30%) percent interest. *Id.*

The court found that the transfer agreement at issue conveyed the tract subject to the terms and conditions of Farmout and Option Farmout, wherein Transferor (Cook) reserved a 30% reversionary interest after payout. *Id.* Since the tract was burdened with the obligation of the reversionary interest, that portion was insusceptible to the sheriff's foreclosure sale. *Id.* The court concluded that the future payout sufficiently burdened, or encumbered, the tract so as to take it out of commerce. *Id.*

When applying that same logic to the case at bar, the courts finds that the lands located in the Protective Area were sufficiently burdened, or encumbered, by the August 31, 1966 deed so as exempt their conveyance from the May 3, 1971 deed. The court revisited the pertinent language in the 1966 deed, paying particular attention to the sentence that reads:

> "Grantor binds and obligates itself to convey to Grantee, from time to time, all of its rights, title and interest in and to the oil, gas and other minerals in each known Productive Sand when and if said sand is established to be productive or capable of production in the Protective Area."

This language the court finds very similar to the language cited in the *North Finn* case where an ownership interest was not to be transferred until a future event occurred, with that event being the production of minerals. That court in *North Finn* found that even before the future event occurred, the interest was burdened with the reversion to such an extent that it was insusceptible to foreclosure. Following that reasoning and applying it to the facts

at bar, since the grantor is **obligated** to transfer to the grantee all rights, title and interest when the sand becomes productive, it only follows that this obligation is an encumbrance that sufficiently burdens the property so as to exempt from the 1971 deed. (Emphasis added).

The court acknowledges that the facts at bar do not constitute a reversion, which is defined by *Black's* as a future interest under which a grantor retains a present right to a future interest in property that the grantor conveys to another. *Black's Law Dictionary,* Sixth Edition. As stated above, although the situation before the court is somewhat different, the analysis to a reversion is helpful in guiding this court to define the rights of the parties involved. Here, the grantor retained certain rights, but those rights, the court finds, were burdened with the obligation to convey "all of its rights, title and interest in and to oil and gas and other minerals in each Known Productive Sand" in the future. The future event that would trigger the conveyance was "when and if such sand is established to be productive or capable of production in the Protective Area."

The next issue the Fifth Circuit ruled on was whether the property description contained in the 1971 deed was sufficient to put third-parties on notice if the description could be found in the public records, more specifically setting forth the following test for determining the sufficiency of a property description:

> The description in a deed must be such that the property intended to be conveyed can be located and identified, and the general rule is that the description must fully appear within the four corners of the instrument itself, or that the deed

> should refer to some map, plat, or deed as a part of the description, so that the same may be clear.

734 So.2d at p. 971.

After listening to the testimony of both parties experts and reviewing the documents introduced, the court finds that the purported description attached to EDC's 1971 deed, which makes reference to the 1944 mortgage does not pass the Court of Appeal's test. The description of EDC's 1971 deed as Gipson, EDC's expert, attempted to describe does not "appear within the four corners" of the 1944 mortgage nor does the 1944 mortgage "refer to some map, plat or deed as a part of the description, so that the same may be clear." In fact, the 1944 mortgage does not contain a straight forward description of property; rather, as Gipson admitted, "this mortgage is kind of a conglomerate of earlier descriptions." Gipson referred to more than one hundred documents (which were not referred to in either the 1971 Southland Mineral Conveyance or in the 1944 mortgage) in his struggle to interpret the 1944 mortgage and describe the purported servitude. Many of the documents referred to by Gipson were not public record, nor were recorded subsequent to the 1971 conveyance.

Specifically, the 1944 mortgage fails to contain an adequate description of either the eastern or western boundaries of the purported servitude. Additionally, the center of the purported servitude is not adequately described.

Gipson started his description of the purported servitude by referring to "Parcel B" under the section captioned "SECOND" appearing on the fifth page of the mortgage. The description purports to describe 1,113.32 acres which

includes "the West 569 acres of Section 104." Gipson testified that he was able to "plot a pretty decent provisional outline . . . by merely calculating a point thirty-three arpents from the Range Line." (Tr. p. 56) At the end of that line, Gipson stated he was "able to swing a provisional division line based on the acreage call, just using geometry." (Tr. p. 57). The best description Gipson was able to give for this "line angle" (Tr. p. 57) was as follows:

> . . . But generally you have a – when I arrived at my provisional east boundary of Mandalay Plantation, I came up with a bearing pretty close to South 32 degrees East, and kind of tending kind of North Northwest, to South Southeast, more or less. (Tr. p. 61).

When asked how confident he was about his provisional east boundary line, Gipson merely offered, "I feel like I must be pretty close, I must be in the ball park."

Gipson testified that his "provisional east line" was "consistent" with lines appearing on five documents. The court reviewed the documents, which were all introduced at trial, and will discuss each one below:

The 1926 T. Baker Smith map (EDC Exhibit 144):

While admitting that the 1926 map was not a survey, Gipson testified that "it serves as at least a visual, graphical confirmation" of the line. (Tr. p. 61) Gipson concluded that his "provisional line" was "generally the bearing that appears to be held, or at least drafted onto this 1926 map." (Tr. p. 61).

The court, considering the generality of Gipson's testimony concerning his use of the 1926 map, finds that the document is not "within the four corners" of the 1944

mortgage nor is it referred to in the 1944 mortgage "as a part of the description." Accordingly, the court finds that Gipson's use of the 1926 map does not pass the test announced by the Court of Appeal for use in this case.

The 1931 plat of lands of H. C. Minor

This document is not a survey. Gipson made the following use of the plat:

> . . . Graphically it appears that the eastern line of Mandalay Plantation has about the same bearing. That tells me that the bearing shouldn't be tilted in another direction, say. (Tr. p. 63)

Again, the court finds this document is not contained "within the four corners" of the 1944 mortgage nor is it referred to in the 1944 mortgage "as apart of the description." Once again, Gipson's use of the 1931 plat does not pass the test announced by the Court of Appeal for use in this case.

The 1931 Intracoastal Waterway plats and descriptions

Gipson testified that these documents "appear to" (Tr. p. 66) correspond with his provisional line. Like the others above, these documents are not "within the four corners" of the 1944 mortgage nor are they referred to in the 1944 mortgage "as apart of the description." Gipson's use of the 1931 Intracoastal Waterway documents fails the Court of Appeal's test for use in this case.

The 1992 St. Martin Deed

Gipson testified that the specific metes and bounds description contained in the 1992 St. Martin deed called

for a bearing of 32 degrees, 04 minutes east along the property line. (Tr. p. 69)

He further stated that the bearing was "reasonably close" to his provisional line. (Tr. p. 69)

The St. Martin acquisition was based on a specific metes and bounds description of property actually purchased in 1992 by the St. Martin's after having been actually surveyed by Charles M. Camp. This transaction occurred nearly fifty years after the 1944 mortgage. The 1944 mortgage does not have a specific metes and bounds description. The 1944 mortgage merely refers to "the West 569 acres of Section 104." Since EDC does not contend that its the 1971 deed is coextensive with the property purchased by the St. Martins in 1992, the property description is not relevant.

The 1992 deed is not "within the four corners" of the 1944 mortgage nor is it referred to in the 1944 mortgage "as a part of the description." The court again finds that Gipson's use of the 1992 property description fails to pass the test announced by the Court of Appeal for use in this case.

The 1979 Charles Camp Survey, Revised 1983 and 1986

Gipson testified that his provisional line "compares very favorably" to a line entered into the Fenstermaker data base but taken from the Camp survey. (Tr. p. 72) The Camp survey was based upon specific metes and bounds descriptions contained in a sale from James Robbins to AG-Lands Investment Company in 1986. Such a description has no relevance to the 1944 mortgage.

The 1986 document is not "within the four corners" of the 1944 mortgage nor is it referred to in the 1944 mortgage "as a part of the description." Accordingly, Gipson's use of the 1986 survey also fails the Court of Appeal's test for use in this matter.

On cross examination, Gipson admitted that the 1944 mortgage contained no bearing for the line he had "swung." (Tr. p. 135). Gipson concluded his cross examination about the eastern boundary of the purported servitude as follows:

> Q. Did the document have a bearing?
>
> A. There's no bearing, but there is enough information to place a line.
>
> Q. If the parties agree to it?
>
> A. If the parties agree to it. This is a sufficient description to place a line, provisionally, for the eastern boundary of Mandalay. And again, I did not conduct an on-the-ground survey to place this but it's certainly enough to graphically place it on an existing base map (Tr. p. 135).

The court finds that regardless of whether a provisional line is sufficient notice for the parties to a document, it is not sufficient to affect the rights of third parties. The defendants are third parties to the instrument. Likewise, "graphically" placing a line on a map does not establish a legal boundary. Gipson never provided a description of his provisional eastern boundary line.

The ninth page of the 1944 mortgage purports to describe under "3rd" a property referred to as "WATERPROOF PLANTATION." In his testimony, Gipson attempted to "provisionally" locate the western boundary of

EDC's alleged servitude by reference to "Waterproof Plantation." (Tr. pp. 80-83) He testified that Bayou Black was its northern boundary while the southern boundary was "such depth as the survey." However, no survey was attached or referred to in the 1944 mortgage.

Gipson testified that he colored what he "determined to be an approximate twenty arpent frontage." (Tr. p. 82) he testified that he started at the "lower line" of Section 64 and that "approximately twenty arpents" put him "somewhere in the vicinity" of "Section 60", but "covering Section 61, 62, and 63, certainly." (Tr. pp. 82-83) Gipson explained that he chose the "lower line" of Section 64 as the eastern boundary of this tract because of the reference to "Waterproof Plantation" appearing above on the same page of the mortgage under the section labeled "2". Finally, Gipson completed his provisional description by speculating that the west boundary of "Waterproof Plantation" was lands of "Flora Plantation, now or formerly belonging to C. W. Bocage." (Tr. p. 83)

Gipson testified that his "provisional west line" was confirmed by the following. Again, the court will address each one separately based on the testimony offered at trial:

The 1926 T. Baker Smith map

Gipson testified that his provisional description of "Waterproof Plantation" was confirmed by the 1926 map. Based upon information provided to him by Keith Hebert, Gipson speculated that the property shown on the 1926 map as being property of Joseph F. Daspit was the same property as "Flora Plantation, now or formerly belonging to C. W. Bocage" in the 1944 mortgage. Finally, Gipson concluded that a dotted line appearing on the map on

property marked as Joseph F. Daspit "seems like that would be in the neighborhood of the western line of Waterproof Plantation, somewhere close to how it's being exhibited on this 1926 plat." (Tr. p. 86)

Even considering the generality of Gipson's testimony concerning his use of the 1926 map, the document is not "within the four corners" of the 1944 mortgage, nor is it referred to in the 1944 mortgage "as a part of the description." Once again, the court finds that Gipson's use of the 1926 map does not pass the test announced by the Court of Appeal for use in this case.

The well location plat for Brewster-Bartle Drilling Co. Southdown Sugars No. 1 Well in Section 60:

Gipson testified that he "considered" the fact that the well plat showed "a property line" ninety feet west of the section line. (Tr. p. 89) The well location plat is not of public record in Terrebonne Parish. The plat, dated November 4, 1956, was prepared 12 years after the 1944 mortgage. The purpose of the plat was to show the location of the well, not the property line. The 1956 document is not "within the four corners" of the 1944 mortgage nor is it referred to in the mortgage "as a part of the description." Gipson's use of the this well plat fails to pass the Court of Appeal test for use in this case.

Pipeline right-of-way agreements and maps:

Gipson testified that, "The pipeline right-of-way plats kind of confirm that the common boundary line is somewhere just over the line into Section 59." (Tr. p. 93) The pipeline right-of-way agreements were executed between 1971 and 1976, after the purported 1971 servitude and thirty years after the 1944 mortgage. Referring to EDC

Exhibit 115, at the times when the right-of-way agreements were executed, there was a dispute over the location of the property line. The dispute was not resolved until 1981 when the then owners of the respective properties entered into a boundary agreement. The right-of-way documents are not "within the four corners" of the 1944 mortgage nor are the right-of-way documents referred to in the 1944 mortgage "as a part of the description." Gipson's use of the right-of-way documents fails the Court of Appeal's test.

SURVEY OF MANDALAY-WATERPROOF PLANTATIONS dated February 9, 1979, revised June 28, 1983, and revised January, 1986:

With regard to this survey, Gipson testified:

> So, this shows a slightly different position of that common property line, but still, by inference, certainly it's located within Section 59, when this plat was made. (Tr. p. 94)

This survey tracks a specific metes and bounds property description included in a January 23, 1986 conveyance from James Robbins to AG-Lands Investment Company. (EDC Exhibit 141) Since EDC does not contend that the 1971 deed is coextensive with the property purchased by AG-Lands Investment Company in 1986, the property description is not relevant. The 1986 sale occurred more than forty years after the 1944 mortgage and fifteen years after the purported 1971 servitude. The disputed boundary between Robbins and the Daspit family had been settled five years before. (EDC Exhibit 115) The survey is not "within the four corners" of the 1944 mortgage nor is it referred to in the 1944 mortgage "as a part of the description." Gipson's use of the survey does not pass

the test announced by the Court of Appeal for use in this case.

Boundary Agreement By Alida Leonard Daspit, et al To James G. Robbins, filed of record April 15, 1981:

According to Gipson, which was undisputed, this document "finalized" the boundary between James Robbins and the Daspit heirs. The boundary agreement settled a disputed boundary. However, the court does not find that this 1981 boundary agreement establishes the western boundary of EDC's 1971 deed. To the contrary, the 1981 agreement confirms that until 1981 there was a dispute over the boundary. The 1981 boundary agreement is not "within the four corners" of the 1944 mortgage nor is it referred to in the 1944 mortgage "as a part of the description." The court once again finds that Gipson's use of the boundary agreement does not pass the test announced by the Court of Appeal for use in this case.

Hearsay possessory information:

Gipson testified that he was in the same room when the deposition of Camp was taken. Gipson testified at trial that he heard Camp testify at his deposition that there was an old possession line actually on the ground (Tr. pp. 95-96). Gipson did not provide the location of the old possession line nor did Gipson attempt to provide a legal description of the line.

Gipson admitted that the purported possession line was not reflected by the public records. The 1981 boundary agreement confirms that prior to the agreement, there was no clear boundary between the properties. The possession line, even if located, is not "within the four corners" of the 1944 mortgage nor is it referred to in the 1944 mortgage

"as a part of the description." Gipson's use of the possession line does not pass the test announced by the Court of Appeal for use in this case.

On cross examination, Gipson seemed to vacillate. He did not measure "twenty arpents front" along Bayou Black as referred to in the 1944 mortgage. Actually, Gipson measured twenty-two arpents perpendicular to the section line. (Tr. p. 157) Also, Gipson did not use actual section measurements. Gipson "averaged" the widths of Sections 61, 62, 63, 64, 65 and 66. (Tr. p. 156)

At trial, Camp specifically addressed Gipson's procedure for measuring the "twenty arpents" Camp's testimony was as follows:

A. . . . The deed [mortgage] specifically said along Bayou Black. So you don't measure at right angle to the Section Line, you measure along Bayou Black. I mean, you know, that's what you've got to do.

Q. And when you do that, what's the difference in the measurements?

A. Well, the difference in the measurements, twenty arpents, is three thousand eight hundred and forty feet, and the scale distance, just scaling on a straight line, as best I can, by holding it up like this, is fifty nine hundred feet.

Q. So the difference, roughly, is –

A. Is two thousand feet, roughly.

Q. So that is – would you consider that to be a significant difference?

A. Oh, yes sir, yes sir, absolutely, two thousand feet, that's almost a half a mile.

Q. So, we're talking about a fairly significant difference?

A. Yes sir, you're talking about a considerable difference.

Q. And when you said actual survey, you mean based on surveys you had personally done?

A. That is correct, sir, surveys that I did, on-the-ground surveys that I did, yes sir.

In 1971, no property had its western boundary in Section 59. Gipson's effort to use the "twenty arpent" measure of "Waterproof Plantation" to move the western boundary of the property from "somewhere in vicinity" of "Section 60" into Section 59 is not consistent with other provisions of the 1944 mortgage. (Tr. pp. 82-83) On the ninth page of the 1944 mortgage under the heading "FOURTH," Parcel "M" describes the western boundary as being the "Easternmost (approximately) 600 feet of Section 60 between parallel liens, running from the bayou the full depth thereof." As directed on cross examination, Gipson marked the easternmost 600 feet of Section 60 on the Fenstermaker map. On cross examination, Gipson eventually testified that none of the many documents from which he testified actually included any of Section 59 as the western boundary of the property.

Part of the confusion over the western boundary of the 1971 deed results from use of the term "Waterproof Plantation" and Gipson's attempt to place "Waterproof Plantation" in Section 59. The reference to "Waterproof Plantation" in the 1944 mortgage appears on its ninth page. As established above, Section 59 is not mentioned in

the 1944 mortgage. Gipson assumed that because the term "Waterproof Plantation" also appeared on that same page of the mortgage under "2nd" it must be the same property described under "3rd". However, Gipson's assumption was fatally flawed.

Under cross examination, Gipson finally admitted that different property described under "THIRD" "Parcel "L" of the 1944 mortgage was the same property described in EDC Exhibit 4 as being "commonly referred to as Waterproof Plantation." (Tr. p. 143) Gipson testified that various properties, miles apart on both sides of Bayou Black, were also referred to as "Waterproof Plantation." (Tr. pp. 143-144) Despite the fact that the 1944 mortgage provided no township, range or section for this particular reference to "Waterproof Plantation," Gipson assumed or speculated that his "twenty arpent" Waterproof Plantation included Section 59.

The court, therefore, concludes that the western boundary of EDC's purported servitude has not been established by EDC. Particularly, the boundary has not been established in Section 59, Township 17 South, Range 16 East. The 1944 mortgage refers to the "Easternmost 600 feet (approximately) of Section 60." It seems clear that the easternmost 600 feet of Section 60 does not fall within Section 59. No recorded document prior to 1971 refers to the western boundary of any property being in Section 59. A dispute over the boundary was resolved by the compromise line established in 1981 in the Boundary Agreement between Robbins and the Daspit heirs.

The court once again finds that EDC has not established a western boundary for its purported 1971 servitude. Taken in its best light, EDC introduced evidence of

the western boundary for its purported 1971 mineral servitude as follows: starting at the "lower line" of Section 64 and measuring approximately 20 arpents frontage on Bayou Black, but more like 22 arpents, and even closer to 5,900 feet, to a point "somewhere in the vicinity" of "Section 60" which Gipson calls Section 59, but "covering Sections 61, 62, and 63, certainly," assuming, of course, that the "lower line" of Section 64 is the eastern boundary of the tract because of the reference to "Waterproof Plantation" appearing on the same page of the 1944 mortgage under a different section and further assuming that the west boundary of "Waterproof Plantation" was lands of "Flora Plantation, now or formerly belonging to C. W. Bocage" which is assumed to be the same property currently belonging to the heirs of Daspit, but, however only if you average the widths of Sections 61, 62, 63, 64, 65 and 66 as opposed to using the actual section measurements and only if you take your measurements at a right angle to the section lines as opposed to measuring the frontage of Bayou Black and finally if you ignore the fact that the actual language of the 1944 mortgage describes the western boundary as being the easternmost 600 feet (approximately) of Section 60.

Not only has EDC failed to establish the external boundaries of its purported 1971 servitude, it also failed to establish the internal boundaries. The 1971 Southdown Lands Mineral Conveyance deed contained the following express exception:

> There is excepted from the conveyance here made all lands and mineral rights heretofore conveyed or transferred by Vendor or its predecessors in title to third parties or terminated by prescription.

The court ruled that the August 31, 1966 Mineral Conveyance is such an exception. While EDC argued it received no rights under the August 31, 1966 deed insofar as the "red line" or "Protective Area" is concerned, it nevertheless claims rights under the same instrument insofar as the "blue line" or "Productive Area." According to EDC, its purported 1971 servitude "wraps" around the "blue line" area. Thus, for EDC to establish the "extent" of its servitude as directed by the Court of Appeal, it was necessary for EDC to describe the internal boundary of the purported servitude which it claims is the "blue line" from the 1966 deed.

Although the August 31, 1966 deed does not contain a property description, it does refer to attached plats. In the case of Sunrise Field, Exhibit "D" is the appropriate plat. Gipson started by stating that Exhibit "D" was not a survey. (Tr. p. 27) He described the blue line as follows:

> The Productive Area was more difficult. This is an irregular outline. Portions of it were obviously free-handed on exhibit D, to the '66 agreement. And there were – some of the lines were a bit shaky, whoever took the blue felt-tipped, trying to follow some kind of outline there, and there were portions of it that were kind of shaky, and there was slight variations amongst the [exhibits filed in the various court houses]. (Tr. p. 40)

Gipson speculated as follows concerning the intention of the drafters of the document:

> It's not really laid out in the text of the agreement, but it being labeled Productive Area, you can only surmise that it might have something to do with the geologic outline of maybe some – or where they figured the sands might be kind of

> trending in there. It seems to be kind of northwest, southeast trend. This could be trying to at least blanket an area where they think might be some production.

Gipson never provided a description of the blue line area. (see, Tr. p. 158) When asked if he could survey or locate the blue line area on the ground, Gipson equivocated. First he said it would be a "strange request" (Tr. p. 44) Then, Gipson said "it's almost – not really preposterous, but just given that a highly unlikely situation." (Tr. p. 44) Accordingly, the court finds that EDC did not offer a description of the internal boundary of the 1971 deed.

The court also finds EDC['s] attempt to stretch the western boundary of its purported servitude into Section 59 in an effort to establish one contiguous servitude tract upon which drilling operations on the southern portion would interrupt as to the whole is erroneous.

Camp provided actual surveys establishing that there is not one contiguous property (St. Martin Exhibit 243-A and 243-B). These survey plats reflect the line for the easternmost 600 feet of Section 60 as well as the compromise boundary line pursuant to the 1981 agreement. The surveys also include Camp's interpretation of the red line from the 1966 agreement. Camp's testimony, which the court found highly credible, made it absolutely clear that the properties are not contiguous:

> Q. Now, what is the purpose of this map number 1, what are we attempting to illustrate with this map?
>
> A. That the property is not contiguous, sir.
>
> Q. All right. That is, up here on EDC map number 4, –

A. Yes, sir.

Q. – what we're showing, is that a true survey reflects that the property would not be contiguous?

A. That is correct, sir.

Q. Okay, and you've surveyed these lines?

A. That is correct, sir, as per the documents, yes. (Tr. p. 172).

To eliminate any doubt concerning the lack of contiguity of the property, Camp also presented St. Martin Exhibit 243-B. That document also contains Camp's interpretation of the red line from the 1966 agreement. Camp testified that regardless of the actual placement of the red line, when drawn to scale, it measures 100 feet wide. The 100 foot line would cover the 1981 compromise boundary line, thus destroying contiguity under any circumstances. The court particularly noted that Camps' testimony was not challenged on cross examination, nor did EDC attempt to rebut it.

Based on the above, the court finds that the mineral servitudes and rights burdening the Protective Area of the Sunrise Field stem from an instrument executed between Southdown, Inc. and Southdown Exploration, dated August 31, 1966 because the Properties were sufficiently burdened to be excepted from the May 3, 1971 deed. Absent drilling or production from each of the separate tracts, EDC's mineral servitudes or mineral rights would have prescribed no later that August 31, 1976. Since there was no drilling, this court finds the EDC's rights have been extinguished by prescription based on ten (10) years nonuse.

Additionally, the court finds that the Omnibus property description attached as Exhibit "A" to the May 3, 1971 conveyance was not adequate, as per the test set forth by the Fifth Circuit in its earlier ruling, to put third-parties on notice as to which properties were being encumbered. Accordingly, the deed could not affect the rights of the St. Martin Group.

Judgment will be rendered consistent with these Reasons for Judgment.

SIGNED at Gretna, Louisiana on this 17th day of December, 1999.

/s/ Robert Pitre
JUDGE

APPENDIX I

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2001 CA 0993

MANDALAY OIL & GAS, L.L.C AND
VOYAGER PETROLEUM, INC.

VERSUS

ENERGY DEVELOPMENT CORP., MICHAEL X.
ST. MARTIN, VIRGINIA RAYNE ST. MARTIN AND
QUALITY ENVIRONMENTAL PROCESSES, INC.

Judgment Rendered: July 3, 2002

* * * * * * * *

Appealed from the
32nd Judicial District Court
In and For the Parish of Terrebonne
State of Louisiana
Number 123,330
Honorable David W. Arceneaux, Judge

* * * * * * * *

Bernard F. Levy Houma, LA	Counsel for Plaintiffs-Appellees Mandalay Oil & Gas, L.L.C. and Voyager Petroleum, Inc.
David R. Richardson James Barton, III New Orleans, LA	Counsel for Defendant-Appellee Energy Development Corp.
Raymond G. Hoffman, Jr. Metairie, LA	

Patrick W. Gray
Jamie D. Rhymes
Lafayette, LA

A.J. Gray, III
Lake Charles, LA

Timothy C. Ellender, Jr.
Houma, LA

Counsel for Defendants-Appellants
Michael X. St. Martin, Virginia
Rayne St. Martin, and Quality
Environmental Processes, Inc.

* * * * * * * *

BEFORE: CARTER, C.J., PARRO AND CLAIBORNE,[1] JJ.

CLAIBORNE, J.

This is an appeal from a judgment in a concursus proceeding. On appeal, appellants have filed a peremptory exception raising the issue of res judicata for the first time in this matter. For the reasons that follow, we remand this matter to the trial court for a determination of the issue of res judicata, but we retain jurisdiction of the appeal of the judgment on the merits pending disposition of the issue of res judicata.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On September 14, 1998, Mandalay Oil & Gas, L.L.C. (Mandalay) and Voyager Petroleum, Inc. (Voyager) jointly filed this concursus proceeding against Michael X. St.

[1] Judge Ian W. Claiborne, retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

Martin, Virginia Rayne St. Martin (the St. Martins), Quality Environmental Processes, Inc. (Quality), and Energy Development Corporation (EDC). Mandalay and Voyager initiated the proceeding to determine the proper parties entitled to the distribution of a portion of natural gas royalty proceeds attributable to production from two tracts of land – Concursus Tract 1 and Concursus Tract 2.

The pertinent tracts are contained within the KBR RA SUA unit of the Sunrise Field in Terrebonne Parish. In their joint pre-trial statement, the parties stipulated that Concursus Tract 1 lies within a section of the Sunrise Field known as the Protective Area. Concursus Tract 2 lies outside and to the northeast of the Protective Area. According to the petition, Mandalay leased the relevant tracts from the St. Martins and Quality (collectively, the St. Martin Group), while Voyager leased the same tracts from EDC. The St. Martin Group and EDC each claim the right to receive all of the royalty proceeds at issue.

EDC argues that it is entitled to all of the royalties because it is the owner of a mineral servitude covering the two concursus tracts and other contiguous lands. According to EDC, a single, large, contiguous servitude was conveyed to its predecessor-in-title pursuant to a mineral conveyance dated May 3, 1971. EDC further alleges that it has adequately maintained this servitude through operations and production either on the subject concursus tracts or on other contiguous lands contained within its servitude. Because the servitude is contiguous, EDC argues, maintenance of a part of the servitude constitutes maintenance of the whole in order to prevent extinguishment of the servitude through prescription for nonuse.

The St. Martin Group, on the other hand, bases its claim to ownership of the mineral royalties on the St. Martins' ownership of the surface of the concursus tracts.[2] They also assert that EDC does not own any servitude affecting the concursus tracts. In support of this assertion, the St. Martin Group alleges that the 1971 mineral conveyance, upon which EDC bases its claim to a servitude, did not contain an adequate property description to put third parties on notice that a servitude would burden the concursus tracts. They further argue that any servitude EDC may have had in the concursus tracts has been extinguished by prescription of nonuse for a period of at least ten years. According to the St. Martin Group, EDC's servitude, if one existed, was not contiguous such that maintenance of a part of the servitude would constitute maintenance of the whole.

A trial on the merits was held in this matter in April of 2000, after which the judge took the matter under advisement. On September 29, 2000, the trial judge issued a written judgment declaring EDC to be the owner of all of the natural gas royalty proceeds attributable to production from the two concursus tracts. On October 16, 2000, the trial judge issued written findings of fact and reasons for judgment, in which he specifically found that the property description in the 1971 mineral conveyance was sufficient to put third parties on notice that a mineral servitude would burden the concursus tracts. The trial judge further found that EDC had established the existence of a single, large, contiguous servitude, which had been maintained

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[2] Quality owns a 10% interest in the mineral rights pursuant to a transfer from the St. Martins.

sufficiently to avoid prescription. This appeal by the St. Martin Group followed.

In addition to its appeal of the trial court's decision on the merits, the St. Martin Group filed a peremptory exception in this court raising the issue of res judicata for the first time in this matter. The instant lawsuit is one of at least four suits between these parties concerning their respective claims to the mineral rights in the concursus tracts and other surrounding lands. The exception is based on a judgment rendered by the 24th Judicial District Court in the Parish of Jefferson in a suit filed by EDC against the St. Martin Group.

EDC filed the Jefferson Parish suit on July 7, 1997, prior to the commencement of the instant concursus proceeding in Terrebonne Parish by Mandalay and Voyager. In the Jefferson Parish suit, EDC sought a declaratory judgment recognizing it to be the owner of a mineral servitude in the Protective Area of the Sunrise Field in Terrebonne Parish.[3] EDC additionally sought a permanent injunction preventing the St. Martin Group from interfering with its right to the use and enjoyment of the servitude. The St. Martin Group reconvened, seeking declaratory and injunctive relief.

The Jefferson Parish suit went to trial in October of 1999. On December 17, 1999, the trial judge in that matter rendered a judgment against EDC and in favor of Quality.[4]

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[3] As noted previously, Concursus Tract 1 in the instant proceeding is contained within this Protective Area.

[4] The Jefferson Parish trial court judgment, which was introduced into the appellate record of the instant proceeding by EDC, initially

(Continued on following page)

In his judgment, the trial judge specifically determined that the property description in the 1971 mineral conveyance was not adequate to put third parties on notice as to which properties were being encumbered. In addition, the trial judge found that any servitudes or mineral rights EDC may have had in the Protective Area were created by an instrument dated August 31, 1966, and had been extinguished by prescription of nonuse for ten years. Finally, the trial judge specifically stated in his written reasons for judgment that the area over which EDC claimed a servitude was not contiguous.

EDC filed a suspensive appeal of the Jefferson Parish judgment with the Louisiana Court of Appeal, Fifth Circuit. At the time the instant concursus proceeding went to trial in Terrebonne Parish, the Fifth Circuit had not yet ruled on that appeal.[5] The St. Martin Group and EDC advised the trial judge in Terrebonne Parish of the Jefferson Parish suit and the pending appeal, but no exception of any kind was filed. In addition to this oral notification of the trial court about the suit, EDC had previously submitted the

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lists the defendants as Quality Environmental Processes, Inc., et al. Later in the judgment, however, only Quality is listed, despite the fact that the St. Martins are listed throughout the trial judge's written reasons. At oral argument before this court, the parties indicated that the trial judge had added the St. Martins' names in the judgment as defendants on motion of the St. Martin Group subsequent to the initial appeal of the merits of the matter to the Louisiana Court of Appeal, Fifth Circuit. That amendment of the judgment is now on appeal before the Fifth Circuit.

[5] The Fifth Circuit did subsequently rule on the appeal and affirmed the decision of the trial court in **EDC v. Quality Environmental Processes**, 2000-314 (La.App. 5th Cir.12/4/00), 777 So.2d 481, *writ denied*, 2001-0010 (La.3/9/01), 786 So.2d 734.

signed Jefferson Parish judgment and written reasons as an attachment to a pre-trial memorandum filed by EDC. Although the attorney for EDC acknowledged the potential res judicata effect of the Jefferson Parish judgment before the Terrebonne Parish trial court, he opposed the motion for continuance made by the St. Martin Group. Consequently, the motion was denied, and the matter proceeded to trial.

DISCUSSION

Louisiana Revised Statute 13:4231 provides:

> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
>
> (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.
>
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.
>
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

In addition, article 531 of the Louisiana Code of Civil Procedure provides:

> When two or more suits are pending in a Louisiana court or courts on the same transaction or occurrence, between the same parties in the same capacities, the defendant may have all but the first suit dismissed by excepting thereto as provided in Article 925. When the defendant does not so except, the plaintiff may continue the prosecution of any of the suits, but **the first final judgment rendered shall be conclusive of all**. (Emphasis added.)

Res judicata is an issue and claim preclusion device found both in federal law and state law. The purpose of both federal and state law on res judicata is essentially the same – to promote judicial efficiency and final resolution of disputes by preventing needless relitigation. **Terrebonne Fuel & Lube, Inc. v. Placid Refining Co.**, 95-0654, pp. 11-12 (La. 1/16/96), 666 So.2d 624, 631.

Under LSA-R.S. 13:4231, res judicata bars relitigation of a subject matter arising from the same transaction or occurrence as a previous suit. Thus, the chief inquiry is whether the second action asserts a cause of action that arises out of the transaction or occurrence that was the subject matter of the first action. **Terrebonne Fuel**, 95-0654 at p. 12, 666 So.2d at 632. Furthermore, the doctrine of res judicata is not discretionary and mandates the effect to be given to final judgments. **Leon v. Moore**, 98-1792, pp. 4-5 (La. App. 1st Cir. 4/1/99), 731 So.2d 502, 505, *writ denied*, 99-1294 (La. 7/2/99), 747 So.2d 20; *cf.* LSA-R.S. 13:4232.

Louisiana Revised Statute 13:4231 embraces the broad usage of the phrase "res judicata" to include both

claim preclusion (res judicata) and issue preclusion (collateral estoppel). Under claim preclusion, the res judicata effect of a judgment on the merits precludes the parties from relitigating matters that were or could have been raised in that action. Under issue preclusion or collateral estoppel, however, once a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue in a different cause of action between the same parties. Thus, res judicata used in the broad sense has two different aspects: 1) foreclosure of relitigating matters that have never been litigated but should have been advanced in the earlier suit; and 2) foreclosure of relitigating matters that have been previously litigated and decided. **Hudson v. City of Bossier**, 33,620, p. 7 (La. App. 2d Cir.8/25/00), 766 So.2d 738, 743, *writ denied*, 2000-2687 (La. 11/27/00), 775 So.2d 450.

Res judicata cannot be invoked unless all its essential elements are present and each necessary element has been established beyond all question. The res judicata doctrine must be strictly construed, and any doubt concerning its applicability is to be resolved against the party raising the objection. **Berrigan v. Deutsch, Kerrigan & Stiles, LLP**, 2001-0612, p. 5 (La. App. 4th Cir.1/2/02), 806 So.2d 163, 167, *writs denied*, 2002-0388, 2002-0341 (La. 4/12/02), 813 So.2d 410.

Res judicata is an objection usually raised in the trial court by a peremptory exception. Such an exception may be filed at any point in the proceedings in the trial court prior to the submission of the case for a decision. La. Code Civ. P. arts. 927 & 928. In addition, the peremptory exception may be filed in the appellate court for the first time pursuant to article 2163 of the Louisiana Code of Civil Procedure, which provides:

> The appellate court may consider the peremptory exception filed for the first time in that court, if pleaded prior to a submission of the case for a decision, and if proof of the ground of the exception appears of record.
>
> If the ground for the peremptory exception pleaded in the appellate court is prescription, the plaintiff may demand that the case be remanded to the trial court for the trial of the exception.

The St. Martin Group asserts that the evidence in the record is sufficient to prove all the essential elements of res judicata. In the alternative, the St. Martin Group requests that this matter be remanded to the trial court in Terrebonne Parish for a trial on the issue of res judicata.

EDC has argued that article 2163 prohibits this court from remanding the matter to the trial court for a hearing on the exception. Specifically, EDC asserts that remand is only proper when the peremptory exception pleaded is the objection of prescription. We disagree.

The first paragraph of article 2163 authorizes the appellate court to consider and rule on a peremptory exception, when proof of the ground of the exception appears of record. The second paragraph of the article allows the plaintiff to demand that the case be remanded to the trial court for a trial if the ground is prescription. This circuit has determined that once such a demand is made, the court is without discretion in remanding the matter for consideration by the trial court. **Blanchard v. Southern Pacific Transportation Company**, 93-1155, p. 4 (La. App. 1st Cir. 4/8/94), 635 So.2d 742, 744. The Code of Civil Procedure is silent, however, as to the remand of the matter for consideration of other peremptory exceptions.

In reaching the conclusion that a remand of the matter is the best option under the circumstances of this case, we are guided by the approach taken under similar circumstances in **Lewis v. Lewis**, 155 La. 231, 99 So. 202 (La. 1923),[6] wherein the Louisiana Supreme Court recognized that the plea of res judicata could be filed in the supreme court, but nevertheless remanded a motion to dismiss an appeal based on res judicata to allow the moving party to prove the finality of the underlying judgment and to allow the respondent an opportunity to contradict the facts alleged in the motion to dismiss. *See also* **National Union Fire Insurance Company of Pittsburgh, Pa. v. Cagle**, 94-322, p. 14 (La. App. 3d Cir. 11/2/94), 649 So.2d 642, 651, *writs denied*, 94-2932 & 94-3002 (La. 3/17/95), 651 So.2d 266; **Stansell v. Stansell**, 622 So.2d 1203, 1205 (La. App. 2d Cir. 1993). We believe that the evidence in the record does not clearly prove the elements necessary to sustain the exception. It is not clear whether some or all of the property and servitudes involved in the prior suit are the same as those involved in the present suit. Therefore, we hereby remand this matter to the trial court for a hearing on whether, and to what extent, the ruling by the Jefferson Parish trial court is conclusive of this matter.

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[6] This case applies article 902 of the former Code of Practice, the source provision for current article 2163 of the Code of Civil Procedure. The comments to article 2163 declare that this article does not change the law and simply restates the jurisprudence interpreting its source provision.

CONCLUSION

For the foregoing reasons and in the interest of justice, we remand this matter to the trial court for a trial on the peremptory exception raising the objection of res judicata filed by Michael X. St. Martin, Virginia Rayne St. Martin, and Quality Environmental Processes, Inc., but we retain jurisdiction of the appeal of the judgment on the merits pending disposition of the issue of res judicata. The costs of this appeal will be assessed once the appeal of the judgment on the merits has been considered by this court.

REMANDED; APPEAL STAYED.

APPENDIX J

MANDALAY OIL & GAS, L.L.C. AND VOYAGER PETROLEUM, INC.	* * *	32ND JUDICIAL DISTRICT COURT
v.	* * *	PARISH OF TERREBONNE
ENERGY DEVELOPMENT CORP., MICHAEL X. ST. MARTIN, VIRGINIA RAYNE ST. MARTIN AND QUALITY ENVIRONMENTAL PROCESSES, INC.	* * * * *	STATE OF LOUISIANA
DOCKET NUMBER 123330	* *	DIVISION D

REASONS FOR JUDGMENT ON
EXCEPTION OF RES JUDICATA

(Filed Feb. 3, 2003)

On September 14, 1998, Mandalay Oil & Gas, L.L.C., and Voyager Petroleum, Inc., initiated this concursus proceeding to determine the proper distribution of a portion of natural gas royalty proceeds attributable to production from a producing unit in the Sunrise Field of Terrebonne Parish, Louisiana Ownership of the royalty proceeds was claimed by Energy Development Corporation (hereinafter "EDC") on the one hand, and by Michael X. St. Martin, Virginia Rayne St. Martin, and Quality Environmental Processes, Inc. (hereinafter "the St. Martin Group") on the other. By judgment rendered September 29, 2000, this court declared EDC the owner of all natural gas royalty proceeds attributable to production from the

following described property (hereinafter "the Concursus Tract"):

> Two (2) certain tracts of land located in Terrebonne Parish, Louisiana, identified as Tract 1 and Tract 2 and depicted on that map or plat entitled "Mandalay Oil & Gas, L.L.C. KBR RA SUA St. Martin/EDC No. 1 Located in Section 1, T18S-R16E, Sections 65 & 66, T17S-R16E, Sections 66, 65, 64 & 63, T17S-R17E, Section 16, T18S-R17E, Terrebonne Parish, Louisiana," which map or plat is recorded at COB 1614, folio 83, entry number 1025668 of the records of the Terrebonne Parish Clerk of Court.

The claim of the St. Martin Group was rooted in ownership of the surface of the Concursus Tract. They alleged any applicable mineral servitude of EDC prescribed in their favor. EDC asserted the existence of a mineral servitude over the Concursus Tract, allegedly maintained by operations and production on acreage contiguous to the land in question.

This court found that EDC acquired a single large mineral servitude over lands that included the Concursus Tract, by an instrument entitled "Conveyance by Southdown Lands, Inc. to Pelto Oil Company," dated May 3, 1971, and effective January 1, 1971 (hereinafter "1971 Mineral Conveyance"). This single servitude was found to affect contiguous land on which mineral operations sufficient to prevent the accrual of prescription were conducted. As a result, EDC remained the owner of the minerals under the Concursus Tract and was entitled to the royalty proceeds attributable thereto.

This court rejected an alternative argument by the St. Martin Group that the property description in the 1971 Mineral Conveyance was insufficient to give notice to third

parties that a mineral servitude in favor of EDC's ancestor in title, Pelto Oil Company, would burden the Consursus Tract. The St. Martin Group argued that the property description was ambiguous or was an "omnibus description," and that, therefore, no mineral servitude was created by the document. This court found that the description was not an "omnibus description" and was adequate to affect third parties because the description was clear by reference to other recorded instruments.

On appeal before the Louisiana First Circuit Court of Appeal, the St. Martin Group urged a peremptory exception of res judicata for the first time. On July 3, 2002, the Court of Appeal remanded the matter to this court for a determination of the issue of res judicata and otherwise retained jurisdiction of the appeal. A hearing was conducted by this court on August 30, 2002, and December 13, 2002, in connection with the exception. The court has reviewed all the documentary evidence introduced at said hearing and has carefully considered all the arguments of counsel.

On December 17, 1999, prior to this court's judgment in this case, judgment was rendered by the 24th Judicial District Court in Jefferson Parish, Louisiana, in the case of *Energy Development Corporation v. Quality Environmental Processes, Inc., Michael X. St. Martin and Virginia Rayne St. Martin*, bearing docket number 511546. In that case, EDC sought a declaratory judgment against Quality Environmental Processes, Inc., Michael X. St. Martin, and Virginia Rayne St. Martin. The district court in Jefferson Parish found that the 1971 Mineral Conveyance *did not* create mineral rights or servitudes that ultimately favored EDC and that the property description in the 1971 Mineral Conveyance *was not* adequate to affect third parties.

This judgment was affirmed by the Louisiana Fifth Circuit Court of Appeal, and the Louisiana Supreme Court denied writs on March 9, 2001. Based on this Jefferson Parish judgment, which became final *after* the decision by this court in this Terrebonne Parish case, the St. Martin Group lodged their exception of res judicata with the Louisiana First Circuit Court of Appeal, claiming that the final Jefferson Parish judgment is conclusive and binding on the litigants in the Terrebonne Parish case.

In connection with its remand of this matter, the First Circuit stated the following:

> "We believe that the evidence in the record does not clearly prove the elements necessary to sustain the exception. It is not clear whether some or all of the property and servitudes involved in the prior suit are the same as those involved in the present suit. Therefore, we hereby remand this matter to the trial court for a hearing on whether, and to what extent, the ruling by the Jefferson Parish trial court is conclusive of this matter."

Louisiana Revised Statute 13:4231 in pertinent part provides as follows:

> "Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
>
> * * *
>
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment."

In its opinion resulting in the remand of this matter to this court, the First Circuit alluded to the effect of La. R.S. 13:4231:

> "Louisiana Revised Statute 13:4231 embraces the broad usage of the phrase "res judicata" to include both claim preclusion (res judicata) and issue preclusion (collateral estoppel). Under claim preclusion, the res judicata effect of a judgment on the merits precludes the parties from relitigating matters that were or could have been raised in that action. Under issue preclusion or collateral estoppel, however, once a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue in a different cause of action between the same parties."

The Jefferson Parish judgment became final and valid on March 9, 2001, when writs were denied by the Louisiana Supreme court. The judgment of this court in the instant case is not yet final, inasmuch as the same was suspensively appealed to the First Circuit and the appeal is still pending.

Because the Jefferson Parish judgment is final and valid, it is conclusive with respect to any issue in the Terrebonne Parish case if that issue was actually litigated and determined in the Jefferson Parish case and its determination was essential to the Jefferson Parish judgment. Of course, this presupposes that the cases in Jefferson Parish and Terrebonne Parish were between the same parties.

This court's judgment in the Terrebonne Parish case was based on its determination that the 1971 Mineral Conveyance *did* create mineral rights or servitudes that

ultimately favored EDC and that the property description in the 1971 Mineral Conveyance *was* adequate to affect third parties. The Jefferson Parish judgment was based on its determination that the 1971 Mineral Conveyance *did not* create mineral rights or servitudes that ultimately favored EDC and that the property description in the 1971 Mineral Conveyance *was not* adequate to affect third parties. These issues actually were litigated in the Jefferson Parish proceeding and both were resolved against EDC. The resolution of both of these issues was essential to the Jefferson Parish decision; a contrary ruling with regard to both issues necessarily would have resulted in a judgment in favor of EDC.

Issue preclusion or collateral estoppel requires this Terrebonne Parish court to accept the Jefferson Parish resolution of the cited issues and apply the same to the Terrebonne Parish case, if the Jefferson Parish litigation and the Terrebonne Parish litigation were between the same parties. The Jefferson Parish case was a suit for a declaratory judgment initiated by EDC against Quality Environmental Processes, Inc., Michael X. St. Martin, and Virginia Rayne St. Martin. The Terrebonne Parish case was a concursus proceeding initiated by Mandalay Oil & Gas, L.L.C., and Voyager Petroleum, Inc., against EDC, Quality Environmental Processes, Inc., Michael X. St. Martin, and Virginia Rayne St. Martin. The opposing sides in the Terrebonne Parish case were identical to the opposing sides in the Jefferson Parish case.

EDC has correctly pointed out that the Jefferson Parish judgment is in favor of Quality Environmental Processes, Inc., only. The judgment is silent as to the claims of Michael X. St. Martin and Virginia Rayne St. Martin. As a result, under our law it must be supposed

that the claims of Michael X. St. Martin and Virginia Rayne St. Martin were rejected by the Jefferson Parish District Court. Assuming for the moment that this is correct, the fact remains that the litigation in Jefferson Parish was between opposing sides composed of the identical persons who were on opposing sides in the Terrebonne Parish litigation.

It is apparent that the Jefferson Parish District Court in its judgment failed to include Michael X. St. Martin and Virginia Rayne St. Martin as named prevailing parties. The judgment did not expressly rule against them. It simply failed to mention them. A review of the Jefferson Parish District Court's reasons for judgment clearly reveals the issues discussed hereinabove were resolved in favor of Mr. and Mrs. St. Martin. The failure to include them along with Quality Environmental Processes, Inc., as prevailing parties in the court's judgment was an obvious mistake. Based on its resolution of the issues described above in the Jefferson Parish case, the district court could not logically have ruled in favor of Quality Environmental Processes, Inc., and at the same time denied the claims of Michael X. St. Martin and Virginia Rayne St. Martin.

Because the Jefferson Parish judgment is a valid and final judgment which resulted from the resolution of issues identical to those presented in the Terrebonne Parish case and essential to the Jefferson Parish judgment, and because both cases were litigated by the same opposing parties in both venues, collateral estoppel rules require that this court accept the Jefferson Parish resolution of said issues. This result is mandated by La. R.S. 13:4231, notwithstanding this court's view that the Jefferson Parish judgment is wrong and that this court's original judgment was correct.

Judgment has been entered in accordance with these reasons for judgment.

SIGNED in Chambers at Houma, Louisiana, on this 27th day of January, 2003.

/s/ David W. Arceneaux
DAVID W. ARCENEAUX
District Judge

Please serve notice of judgment on:

1. Mandalay Oil & Gas, L.L.C., through its attorney of record, Bernard F. Levy, 209 Goods Street, Suite 204, Houma, Louisiana 70360.

2. Voyager Petroleum, Inc., through its attorney of record, Bernard F. Levy, 209 Goode Street, Suite 204, Houma, Louisiana 70360.

3. Michael X. St. Martin, through his attorney of record, A.J. Gray, III, P. O. Box 1467, Lake Charles, Louisiana 70602-1467.

4. Virginia Rayne St. Martin, through her attorney of record, A.J. Gray, III, P. O. Box 1467, Lake Charles, Louisiana 70602-1467.

5. Quality Environmental Processes, Inc., through its attorney of record, A.J. Gray, III, P. O. Box 1467, Lake Charles, Louisiana 70602-1467.

6. Energy Development Corporation, through its attorney of record, ~~James A. Barton, III, Whitney National Bank Building, 228 St. Charles Avenue, Suite 724, New Orleans, Louisiana 70130~~. David Richardson – 1100 Poydras St. – Suite 1800 New Orleans, LA 70163

(As per Judge's Office)
2-6-03